United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

For the District of Columbia Circuit

No. 13,265—April Term, 1956

FRITZ VON OPEL,

Appellant,

—v.—

HERBERT BROWNELL, JR., Attorney General, as
successor to the Alien Property Custodian,

Appellee.

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Volume II
(Pages 609a to 1123a)

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May I make a correction? The law of 1952 does not mention women. There is no distinction between the two.

Q. Dr. Schoch, would these provisions we have been discussing be applied to a usufruct created under German law? A. Yes.

Q. Does the German law make any provision for a case where the market value is greater than or less than the [3973] value which results from the tabulation? A. Yes. Again, Section 16 of the law of 1934 makes a provision to the effect that if the market value of the true income or benefits can be shown to be less or higher than the capital value which results from applying the table, then such proved value shall be used as a basis.

Q. Does the German law, Dr. Schoch, make any provision for the case where the income is uncertain or fluctuating? A. Yes, because in order to apply this table, you have to ascertain the annual value of the income or benefits and then you multiply your annual value with the multiplier which the table provides; in order to ascertain your annual value, Section 17 of the act sets out certain rules.

Where the income is derived from a fixed sum of money, Section 17, Paragraph I provides that you take the legal rate of interest as the annual value. That is 4 percent under the law. It was changed to 5.5 percent by the regulations of 1935, which were in force in 1941 and 1942.

Then, Section 17 in Paragraph II, provides a rule for fixing the value of benefits or income which are not in money but in physical facilities, such as living quarters, board, food, merchandise, and so on, and says that the value of these things shall be evaluated at the customary median prices at the place where they are furnished.

[3974] Finally, Section 17 provides for income or benefits which are uncertain or subject to fluctuation as regards the amount, having in mind income from shares of stock, from participation in shares in a partnership, or similar situations where your income may vary from year to year. In that case the evaluation shall be based upon the average annual amount which will probably accrue in the future.

Q. Dr. Schoch, which of these provisions of Section 17 would be applicable to dividends on shares of stock? A. The last paragraph would be applicable. That is the income from shares of stock will be evaluated according to the average annual income to be expected in the future.

Q. Under Sections 16 and 17 of the tax evaluation law, in your opinion, Dr. Schoch, what kind of a usufruct would those sections be applicable to? A. These sections are applicable to a usufruct as defined and provided for in the German Civil Code.

Q. Fine. Now, Dr. Schoch, I would like to show you Finding 52 as printed in the record at Pages 60 and 61, and ask you if in your opinion that is a correct statement of the general provisions of the civil code concerning a usufruct in intangible property. A. It is.

The Court: Mr. Baum, I think for the record I would like to have that read.

[3975] Mr. Baum: Surely, your Honor.

"A right of usufruct once established is under German law an in rem right in property. A person having a usufruct in property has a right: (a) to the enjoyment of the property, or in the case of money or securities, to the income from the securities; (b) to co-possession of the property together with the person holding legal title to the property; (c) to a voice in the management of the property insofar as the maintenance and preservation of the usufructuary's right under sub-section A above are concerned; (d) to prevent the sale or disposition of the property as a result of his right to co-possession; (e) the German civil code does not mention whether the usufructuary for the protection of his income has any voting rights.

"In the absence of a decided case, the legal commentaries speculate in three different directions. One position is that the title owner has all voting rights, and the usufructuary no voting rights whatsoever.

"The second position is that the title owner has a voting right for all measures which have nothing to do with income, while the usufructuary can vote in regard to income.

"The third position is that the usufructuary has all the voting rights."

That is the complete finding, your Honor.

[3976] *By Mr. Baum*:

Q. Dr. Schoch, is it possible under German law to have a usufruct, let's say, in shares of stock, wherein the usufructuary has, in addition to the rights which I have just read as being set forth in the finding, sole possession and exclusive control over the usufruct property? A. It is possible for the parties to make an agreement to that effect. There is nothing in German law which would prevent them or prohibit them from doing so.

I may add, I found an express statement to this effect in the treatise of an eminent author on the law of property in Germany. That is the treatise of Martin Wolff in Section 116.

Q. Dr. Schoch, does the German tax law set forth any other standard for evaluating the interest of a person holding property? A. The German tax law has certain rules as to who, for purposes of the tax law, is the owner of the property. Before you reach the question of evaluation, let's say, usufruct as contrasted with the ownership, the Court may have to decide who is the owner of the property in the meaning of the tax law.

The tax law in Germany has developed a notion of ownership which deviates from the notion of civil law. That is the notion of economic or beneficial ownership.

In the tax law, you may have a situation where you have a usufruct established, and in addition to the usufruct [3977] the donor of the usufruct reserves to himself all the rights of an owner except the legal title, which he transfers to the other person.

In this situation, the tax law does not raise the point of evaluating the usufruct, because the tax law says in this case the usufructary is the beneficial owner of the property and is taxed for this property as the owner.

Q. Could you cite us any provision of the tax law which would support that statement, Dr. Schoch? A. This provision was originally contained in Section 80 of the German tax code of 1919, subsequently in Section 89 of the tax code, and it was finally taken over into the tax adjustment law as Section 11.

Q. Did you say Section 89, Doctor? Did you mean 98? A. 98, sorry. Section 80 or 98, respectively, of the tax code provided that a person who possesses a piece of property as belonging to him is treated as an owner for purposes of the tax laws.

Q. Are there any other provisions of German law, Dr. Schoch, which embody a similar concept? A. The tax law considers as the economic or beneficial owner not only this person who possesses the property as belonging to him, but similarly a person who has transferred the property to another in a fiduciary capacity or the person [3978] who has transferred his property to another for the mere purpose of securing an obligation, a transfer with the understanding that the property is to be re-transferred to the owner. These are the three instances, I would say, in which the tax law considers as the owner not the holder of the legal title, but the transferor or the proprietary possessor.

Q. Apart from the tax law, Dr. Schoch, are there any other provisions of German law having a similar concept? A. The same concept of economic or beneficial ownership was applied or taken over by the Foreign Exchange Control Laws, which naturally were closely connected with the law of taxation.

From the beginning when the first foreign exchange controls were instituted, in Germany, in July, 1931, the law established a duty for persons residing in Germany to report to the Government and tender for conversion into German currency certain foreign assets, like foreign currency, claims in foreign currency, and other defined assets.

The law expressly said that this duty is imposed on the owner and likewise on a person who possesses such assets as a proprietary possessor.

Q. Is that term "proprietary possessor" defined in German law anywhere? A. The term "proprietary possessor" is a notion which [3979] is defined in the civil code. The civil code in various respects makes provisions for rights of a proprietary possessor and defines him as a person who possesses a thing as belonging to him.

This definition is contained in Section 872 of the civil code.

Q. Could you give us any factual illustrations of what the German law means by a "person who possesses a thing as belonging to him"? A. A person who possesses property, who has transferred or has never had title to the property but in all other respects exercises the rights of an owner. For instance, even a thief can be a proprietary possessor. He has no legal title, but he exercises the rights of an owner. A person, who, let's say, has acquired by contract a piece of land but the conveyance of the land is not yet completed. In other words, his title is not yet entered in the land register. So for purposes of passing title, he is not yet the owner, but for the purposes of tax law, he is the owner if he actually possesses the property and uses it.

Q. Aside from the tax law and the civil code and the foreign exchange law, is there any other provision of German law which embodies this concept of economic or beneficial ownership? A. This concept was again used in the German enemy [3980] property legislation. The legislation which provided for the reporting and the administering of enemy property in Germany in the second World War provided that enemy property is all property situated in Germany, which is either legally or economically owned by enemies.

Q. Can you give us any citation for that, Doctor? A. Yes. The first legislation to that effect is the decree of January 15, 1940, published in the Reich Law Gazette, 1940, Part I, Page 191, which in Section 4 gives this definition of enemy property:

> "Property shall be deemed to be enemy property situated in Germany if it is legally or economically owned by enemies."

This is the notion that recurs throughout the enemy property legislation, for instance, in the decree concerning the reporting of American property of May 4, 1941, published in the Reich Law Gazette, 1941, Part I, Page 472, and by the decree of April 9, 1942, published in the Reich Law Gazette, 1942, Part I, Page 171, which decree made the enemy property legislation of Germany applicable to American property in Germany.

These are the two main examples of the use of the concept of economic ownership outside the tax laws that I would like to mention.

Q. Now, Dr. Schoch, in all these provisions of German [3981] law which you have just testified to on this subject of economic ownership, is the legal title decisive under those provisions? A. No.

Q. Dr. Schoch, I would like you to listen to a hypothetical statement of facts.

Assume a case in which a usufruct is created under German law in shares of stock of a corporation, and the usufructuary is given sole possession, and exclusive control of the shares of stock which are the usufruct property, and, of course, assuming a proper delivery to the usufructuary, and the usufructuary is also given the power to dispose of the usufruct property.

In your opinion, Doctor, would the tables which you have stated are contained in Section 16 of the tax evaluation law be applied in ascertaining the value of the usufructuary's interest?

> Mr. Ennis: Just a minute. Your Honor, I wonder if we could have a little clearer explanation of what Mr. Baum means by power of disposal. Apparently he is asking a hypothetical question which is adding

something to the rights which are recognized by the court and by the testimony as to what constitutes rights of the usufructuary and the legal owner.

On cross-examination of Dr. Kronstein, he used this phrase [3982] "disposing" and "disposal of" without defining it. I don't know whether Miss Schoch understands what it means; I certainly don't know what it means.

And, if there is to be a hypothetical question which introduces that element, I think for the benefit of the court and all the parties, we ought to know what he means by "the right of disposal."

Perhaps your Honor does; I don't.

Mr. Baum: If your Honor please, I am simply stating a hypothetical case which in all respects parallels the decision of the Supreme Court of the United States in this action.

It means sell, transfer, or do anything else you want to with it, and that is exactly what I meant by that question, your Honor.

Mr. Ennis: I, of course, don't agree with the interpretation of the Supreme Court's opinion. I don't think the Court was trying to act as an expert on German law, and it seems to me that Mr. Baum is taking a phrase, an exposition of American law opinion, and trying to turn it into a statement of German law.

The Court: I take it by Mr. Baum's explanation that he means by right of disposal that the usufructuary has a right to sell the property and keep the proceeds as his own.

[3983] Mr. Baum: Yes, among other things; not limiting it to that.

Mr. Ennis: I say there are certainly no facts in this case which support such a hypothetical case.

The Court: I will hear the argument on that point. Your definition of disposal is sell, transfer, and what else did you say—or dispose of?

Mr. Baum: I said or anything else of a similar sort.

Mr. Ennis: As his own property?

Mr. Baum: I don't mean that. I just mean to sell or transfer this property.

The Court: He has control to the extent that he can sell it or transfer it is what I understand him to mean?

Mr. Baum: That is exactly it, your Honor.

Mr. Ennis: What happens to the proceeds, your Honor?

The Court: You can ask that on your hypothetical if you want to whether it would make any difference or not—

Mr. Ennis: (Interposing) Do you care to state that, Mr. Baum?

Mr. Baum: The proceeds can still be held under the usufruct agreement. It doesn't make the slightest difference.

The Court: Do you understand the question?

The Witness: Yes, I think I do.

[3984] A. On the hypothetical facts which have been stated to me, I am of the opinion that a German tax court would not apply the table which I have explained; that is, the German court would not attribute any value to the right of the owner of the legal title, but the court would for tax purposes attribute the entire ownership to the usufructuary who has these additional rights above and beyond his rights as a usufructuary.

Q. Do you have any authority to support that opinion, Dr. Schoch? A. I certainly have. I have formed this opinion on the basis of a case which was decided by the Supreme German Tax Court in 1933, a decision of May 18, 1933, published in the Reich Tax Gazette for 1933, Page 661 and 662.

By Mr. Baum:

Q. Before we get into that case, Dr. Schoch, what is the position of the Supreme Tax Court in the German judicial system? A. It is the highest court in a hierarchy of administrative courts which decide on tax and customs matters.

Q. Is there any appeal from decisions of the German tax court? A. No.

Q. Now, Dr. Schoch, please state for us briefly the facts and holding of the court in the case to which you [3985] have just referred. A. This was a case in which the parents transferred to their children the ownership, the title, of vineyards, which the parents owned, in which the instrument executed transferred ownership to the children, reserved the usufruct in these vineyards to the parents, and further stipulated that a lease agreement which previously had been made between the parents and the children should not be affected by the transfer of title to the children.

Subsequently, the parents and the children entered into an additional agreement which said this lease was to continue, subject to the usufruct right of the parents, and regardless of the legal title of the children.

The Court found as a fact that the parents had reserved to themselves not only the usufruct right but all rights of disposition belonging to an owner with the exception of the formal title entered into the land register.

The Court further found that the purpose of this transaction was not to divide and distribute the property, but to secure the continued joint running of the vinecultural enterprise after the death of the parents, or one of them, and to secure the cooperation of the children in the enterprise.

The Court concluded that the parents and the children regarded and treated the vineyards as being beneficially owned by the parents, and that the children did not hold the [3986] position of an owner exercising the attributes of ownership; that the purpose was to secure the succession to the estate, and the court concluded that for practical purposes the formal title of the children was without any significance since it was highly improbable in view of the rights of the parents in this property that a purchaser might be found willing to buy the vineyards during the life of the parents.

Q. In that decision, Dr. Schoch, did the Court refer to any or cite any sections of the tax code? A. In this decision the Court refers to Section 80 of the Tax Code, which provides that a person possessing a piece of property as belonging to him shall be treated as the owner for tax purposes, and it furthermore refers to Section 872 of the Civil Code, which defines the proprietary possessor.

In other words, the Court holds that the proprietary possessor of such property is the same as the economic owner for purposes of tax law.

Q. Do you have a copy of that decision, Dr. Schoch? A. I have. I have a photostatic copy and the full translation of the text, which I prepared.

Mr. Baum: If your Honor please, I would like to have this marked Defendant's Exhibit 153 and 153-A, and I offer it in evidence.

Mr. Ennis: No objection, your Honor.

[3987] The Court: It will be received.

(Defendant's Exhibit 153 and 153-A were marked for identification and were received in evidence.)

By Mr. Baum:

Q. In that 1933 decision, Dr. Schoch, did the Court refer to any prior cases that were decided? A. The court referred to and relied on a decision which was decided by the same Court in the year 1932, and the Court in its decision of 1933 said, "This is a situation very similar to the situation in the 1932 decision."

This decision was rendered on April 27, 1932, and published in the Reich Tax Gazette for 1932, Page 662.

Q. Would you tell us briefly what the facts were and what the decision of the court was in that earlier decision? A. This decision concerned again a transaction between parents and children with regard to farm property. The parents entered into an agreement with their children, which was very customary, and, in fact, governed by local laws in Germany, under which the parents convey the farm property to a son, as a rule the oldest son, with certain rights reserved to themselves, such as the usufruct in parts of the farm, the right to receive lodging, food, and so on and so forth.

[3988] In this particular agreement, according to the findings of fact of this court, the parents had done this: they had conveyed the title to the farm to a son, but the agreement had expressly provided that in spite of this formal transfer, the parents were to remain the masters on the farm until such time as they would retire.

The Court found as a fact that the son, the legal title holder, had actually the position of a farm hand who got a certain amount of pay and board and lodging and so on, but that he did not have any of the rights of an owner.

At the time the suit arose, the father had died, and the mother continued on the farm. She claimed that all that she had under this agreement was a usufruct in the farm property and that, therefore, she should only be assessed property tax on the usufruct.

The Court, however, found that as long as the surviving parent was actually in control of the property—in other words, that she possessed the property as belonging to herself in the meaning of Section 80 or 98 of the tax code—then the tax was assessable against her and not against the son who was owner of the legal title.

Q. Do you have a copy of that decision and a translation, Doctor? A. This is a photostatic copy of that decision, and the translation which I prepared.

[3989] Mr. Baum: If your Honor please, I would like to have that marked as Defendant's Exhibit 154 and 154-A, and I offer that decision in evidence.

Mr. Ennis: No objection, your Honor.

The Court: It is received.

(Defendant's Exhibits 154 and 154-A were marked for identification and received in evidence.)

By Mr. Baum:

Q. Now, Dr. Schoch, on the basis of the authorities to which you have referred, how would a German court in your opinion, where the beneficial or economic ownership is significant divide the interests of the usufructuary and the legal owner under a German usufruct created in shares of stock under which the usufructuary possessed not only the rights provided in the German Civil Code, but he had sole possession of the usufruct property and a right of exclusive control over such property and the interests of the legal owner were subordinated to that of the usufructuary?

Mr. Ennis: Excuse me. May I have the question read, your Honor? There is a word there, that I don't quite understand.

The Court: Yes.

(Thereupon, the reporter read the pending question.)

Mr. Ennis: Your Honor, I certainly don't know what [3990] Mr. Baum means by either the word "significant" or the word "Subordinate," nor does he limit his case to, for example, what a German court would do tax-wise.

It is something about how would a German court divide the property. Perhaps Miss Schoch knows what the significance of the words "significant" and "subordinate" are in that question. I don't your Honor.

The Court: Has there been any testimony on that?

Mr. Baum: I beg your pardon?

The Court: Has there been any testimony on that?

Mr. Baum: If your Honor please, all I am trying to do is phrase in one question what this witness has been saying.

I am saying in a situation where economic ownership is significant—and I intend to argue to your

Honor that it is, not as a matter of German law, but as a matter of American law, which is for me to do and not this witness—but in a situation where the economic ownership is significant, how in this witness's opinion would a German court divide the interests, and it is not limited to tax.

The Court: What I want to know is what would be the distinction in German law as between "significant" and "insignificant"?

The Witness: I think it is this: for instance, for purposes of the tax law, the beneficial or economic owner [3991] is significant, whereas the legal title is insignificant.

Therefore, the tax law looks to the beneficial or economic owner.

The Court: That is in a tax court. This question, as I understand it, is not limited to a tax law.

Mr. Baum: If your Honor please, if the word "significant" is giving the trouble, I will gladly change it. What I mean is where the court is willing to look at the economic ownership.

The Court: That is his objection?

Mr. Ennis: Yes, your Honor. I would like to make another objection, however. Mr. Baum's explanation to your Honor indicates that he is asking this expert witness to answer the question which is for this Court to answer.

He is in effect asking Miss Schoch if a German court were sitting on this question of vested property, how would it divide the vested property. I think, your Honor, that that is an improper question for an expert on German law.

He is asking the expert witness the ultimate question which is for your Honor to decide.

I think it is beyond her scope, and there are no facts in this record to support the hypothetical question. He is making a hypothetical question in which he is taking phrases from the Supreme Court opinion and saying, how would [3992] a German court decide the case.

The Court: I think I will take the answer to it; and when you sum up, you can argue it on that basis. I know what you are talking about. On the other hand, if I did have a hypothetical question, which had been decided by a German court or a German law says, this is such and such. It might be necessary for me to look to that as a matter of fact. This is a hypothetical question, is it not?

Mr. Baum: Yes, your Honor; purely hypothetical.

The Court: I think maybe you ought to leave that "significant" out unless it has some significance in German law.

Mr. Baum: May we deem that the question is amended, instead of saying in a situation where the beneficial or economic ownership is significant, and say is "called in question"?

The Court: That is all right.

Mr. Ennis: I don't want to labor that point, but how about the word "subordinated"? This question is loaded with the statement that the legal owner's interest is subordinate.

Mr. Baum: Subordinated I said.

Mr. Ennis: Subordinated. I accept the correction.

Mr. Baum: If your Honor please, I think I am entitled to ask my hypothetical question.

The Court: You are entitled to get some evidence on it.

[3993] Mr. Baum: That is a direct quotation, your Honor, from the Supreme Court of the United States.

The Court: Subordinated?

Mr. Baum: Yes, sir; it says "such rights as the legal owner had were subordinated to that of the usufructuary."

The Court: All right, you can argue it later on. Do you understand it now?

The Witness: I would like to have the question read back, please.

Mr. Baum: I think possibly I should read the amended question now.

By Mr. Baum:

Q. On the basis of the authorities to which you have referred, Dr. Schoch, how would a German court in your opinion in a situation where the beneficial or economic ownership is called in question divide the interests of the usufructuary and the legal owner under a German usufruct created in shares of stock, under which the usufructuary possessed not only the rights provided in the German Civil Code, but also had sole possession of the property and a right of exclusive control over the property and the interests of the legal owner were subordinated to that of the usufructuary? A. In view of the fact that the notion or concept of economic or beneficial ownership was developed by the tax [3994] law, but adopted as a general notion of German law for other purposes I would say that a court which is concerned with the question of economic ownership or has before it the question of economic ownership, would reach the conclusion which these tax cases have reached—that is, that on these facts I was asked to assume, the bare legal title of the owner, is to be assessed no value and the rights of the usufructuary are the rights of an economic owner.

Mr. Baum: No further questions, your Honor.

Mr. Ennis: Excuse me just a moment, your Honor.

(After a pause.)

The Court: In your judgment then, if a question came up in such a court, what would happen to this claim, this 20 percent in the dividends? What would happen to that?

The Witness: That would remain a personal claim.

The Court: It would be a personal claim against the owner of the usufruct?

The Witness: Against the parents.

The Court: The only way in which that would be asserted would be against them?

The Witness: Yes.

The Court: There wouldn't be any value—

The Witness: (Interposing) There would not be any right in the property itself.

The Court: There wouldn't be any value fixed for it [3995] which the legal owner would get?

The Witness: No.

The Court: Very well. You may proceed, Mr. Ennis.

Cross Examination by Mr. Ennis:

Q. Miss Schoch, I hope I won't have very many questions, but I will follow the order in which your direct examination proceeded.

First, concerning your testimony that under the gift agreement—Plaintiff's Exhibit 5 in evidence—your first testimony was—and this appears on Page 1806 of the printed record on appeal—that reading the one paragraph, which states that the usufruct in the shares is not assigned to Fritz von Opel, it remains with Wilhelm von Opel and his wife, hereafter called the parents Opel, until the death of the survivor of them; however, 20 percent of all dividends received will accrue to Fritz von Opel.

Looking at that paragraph you stated your opinion that that did not give Fritz von Opel a direct right to 20 percent of the income from the property subject to the usufruct, but gave all of the income to the parents, and gave Fritz von Opel merely a contractual claim against his parents for his 20 percent of the income, is that right? A. Yes.

Q. You will recall that on the first trial of this [3996] action that in addition to testifying about Exhibit 5 alone, you stated, did you not, that in interpreting this transaction between the parents and the son, that a court would also look at the Hackenberg draft, which appears as Exhibit 8, beginning on Page 813 of the printed record; is that not correct? A. Yes, that is correct.

Q. With your familiarity with the whole transaction, did you state, not restricting your opinion on this transaction to this one paragraph of Exhibit 5, but also looking at the draft, Exhibit 8—

> The Court: Is that the Hackenberg?
>
> Mr. Ennis: Yes, sir; the Hackenberg draft, of the gift agreement, which you will recall was not signed but a shorter form was signed, but there is considerable testimony in the record, and I will not go over it all.

By Mr. Ennis:

Q. Reading the words of the gift agreement in the light of the Hackenberg draft, which provided for a usufruct in 75 percent of the shares and also provided that the donee was guaranteed a minimum income, and also having in mind his Honor's finding that the purpose of the gift was to make provision for Fritz von Opel, is it your opinion that a German court could not conclude that Fritz von Opel had a 20 percent income directly in the proceeds of the gift? [3997] A. I would say that it is in my opinion more probable because it is the more reasonable interpretation of the agreement in the light of the Hackenberg draft, that all that the son here is in the final agreement given is a claim against his parents.

I testified to that effect in the first trial and I see no reason to change my testimony today.

Q. Do you recall the deposition of Dr. Hoche which was read into the record yesterday, I believe, to the contrary effect? A. Yes.

Q. By the way, do you happen to know Dr. Hoche as a reputable German lawyer? As a German commentator? A. I know him through his publications. I know him as a reputable lawyer.

Q. Isn't he more than a reputable lawyer? Isn't he a very well known writer of the commentaries on this subject of usufructs? A. I would say fairly well known.

Q. Fairly well known? A. Yes.

Q. And he at one time was the chief justice of a division of the Court of Appeals of Munich, was for some years, was he not? A. I don't know that of my own knowledge.

[3998] Q. You would not say, would you, that Dr. Hoche's interpretation of the agreement was not a reasonable one, did you? A. I would say the interpretation which I have set forth is the more reasonable one, if I may say so.

Q. Certainly, you may. One further question on this 20 percent problem, Miss Schoch, the Court has found that the gift agreement did not establish the usufruct in rem, but that it was established sometime in 1935, at least in 97 shares of the 100 shares of Uebersee, by the delivery of the key to Dr. Frankenberg as the representative of the parent Wilhelm von Opel. Do you recall that? A. Yes.

Q. You recall that finding? A. Yes.

Q. Prior to the establishment of the usufruct in rem in 1935 and between the date of the gift in 1931 and until 1935, did Fritz von Opel have a direct claim to the income from the proceeds of the gift? A. Let me see if I understand you correctly.

You are referring to the time between the making of the gift and the establishing of the usufruct?

Q. Yes. I am asking your opinion as to what are the relations of the donors and the donee in these Opel shares and in the proceeds from the Opel shares under the agreement and immediately prior to the delivery of the key to Dr. [3999] Frankenberg in respect of the income from the gift. Who would receive the income then?

> Mr. Baum: If your Honor please, I fail to see the materiality of this question. This is not an academic examination into German law. We know the usufruct was established, and we are not concerned with all this theory.
>
> The Court: She is an expert in German law, and I will give him that latitude. I will permit it.

A. As long as there was a straight gift, not a usufruct being established, the donee would have the right to the income.

Q. To all of the income? A. To all of the income, yes.

Q. And his parents would merely have the contractual claim against him? A. They would have a contractual claim against him for establishing the usufruct as he agreed to do.

Q. In other words, you say that it was the delivery of the key that terminated Fritz von Opel's right to all the income with his parents having the contractual right and changing the possession so that all he had in place of income was a contractual claim against his parents. Is that right? A. Yes.

Q. Accepting the Court's finding that the usufruct [4000] in rem was established in only 97 of the 100 shares of Uebersee, immediately after the establishment of the usufruct in rem in the 97 shares, did Fritz Opel retain his right to 100 percent of the income from the remaining 3 shares of Uebersee stock? A. If he was the owner of these three shares the same way as of the 97 shares, yes. If the usufruct was established in 97 shares, the income of the parents to which the parents were entitled, was the income from these 97 shares.

Q. We will see if we can take the "if" out.

The Court found, Finding 37, Page 57 of the printed record on appeal:

> "On or before June 7, 1935, Fritz von Opel placed all but three of the shares of Uebersee Finanz-Korporation A.G., in Box 1917 at the Schweizerische Kreditonstalt in Zurich, and, thereafter, delivered them to Dr. Hans Frankenberg."

It was your testimony at the first trial that that is the action which established the usufruct in rem, isn't that correct? A. Yes.

Q. Was any usufruct in rem established in the three shares by the delivery of the key to the 97 shares to Dr. Frankenberg? A. No, I don't think so.

[4001] Q. You don't? A. No.

Q. And therefore Fritz would retain a right to all of the income on the remaining three shares, is that not correct?

> Mr. Baum: Just a moment. Your Honor, he is not entitled to ask this expert a factual question such as this. The witness says if Fritz von Opel has legal title.
>
> The Court: Let's say "if a person."
>
> Mr. Ennis: All right, your Honor. We have been asking interchangeably questions about this gift in such hypothetical questions—
>
> The Court: (Interposing) Your hypothetical question would be better.
>
> Mr. Ennis: All right, your Honor. It all comes out to the same thing.
>
> The Court: All right, but do that, and let him argue it.

By Mr. Ennis:

Q. If the donee did not establish the usufruct in rem in three of the 97 shares of the Swiss holding company, 3 of the 100 Swiss holding company shares, did he retain the right to all the income on these three shares? A. If he owns them, yes.

[4002] Q. If he owns them, yes? A. Yes.

Q. Turning, Dr. Schoch, directly to the heart of the matter, which is your testimony about a usufructuary having certain additional rights of disposal, Mr. Baum called it; in your testimony at the first trial you did not testify that this gift agreement granted any rights additional to those provided in the Civil Code to a usufructuary, did you? A. The gift agreement which I had before me, the written agreement?

Q. That is right. A. No.

Q. And in the first case that you cited, the first tax case, you stated, I think, very clearly that the Court found that the parents in granting the legal title to those vineyards to their children, not only reserved the usufruct but also obtained a lease of the property, isn't that correct? A. No, they leased the property to the children.

Q. They leased the property to the children? A. Yes.

Q. I see. Does the opinion state for what period of time? A. No. The opinion says that prior to this conveyance the parents had leased the property to the children, and [4003] in the agreement which established the usufruct of the parents, they stipulated that this lease was to continue. The conditions of the lease were to remain in effect despite the change of ownership.

Q. Does the opinion say what the conditions of the lease were? A. No. The decision merely refers to the first lease agreement in 1919 and an additional lease contracted in 1924 which among other things provided that the lease was to continue despite the change of ownership.

Q. Didn't you testify that this lease arrangement was continued beyond the death of the usufructuary? A. Not the lease agreement, no.

Q. I thought I heard you testify that the lease arrangements, whether the original lease or the agreement, that a purpose of it was to keep a continuity of management even after the death of the usufructuaries. Am I incorrect about that? A. No, I must not have been sufficiently clear on that matter. The court found that the conveyance with the usufruct reserved to the parents and all the additional rights reserved served the purpose of continuing the running of the farm and the succession of the children to the farm upon the death of the parents.

The lease agreement I do not think was contemplated to [4004] run beyond the death of the parents because beyond the death of the parents there was no lessor.

The Court: This may be a good stopping place. This will give you a chance to think that over.

Mr. Ennis: Thank you very much.

The Court: Be back at two o'clock, please.

(Thereupon, at 12:25 o'clock p.m., the Court was adjourned to reconvene at 2:00 o'clock p.m., the same day and place.)

[4005] AFTERNOON SESSION (2:00 p.m.)

Thereupon, MISS M. MAGDELENA SCHOCH the witness on the stand at the time of the recess, resumed the witness stand, and upon examination, testified further as follows:

Cross Examination by Mr. Ennis (Resumed):

Q. Miss Schoch, I refer to the facts in the two tax decisions which we discussed this morning, Defendant's Exhibits 153 and 154. I will not seek to go over the facts with you in detail because they are in the record but, those cases were limited to determining the annual property tax, is that correct? A. The property tax which used to be assessed in Germany for a period of three or four years—

Q. I see. A. —at a time.

Q. Now, those decisions did not in any way deal with what would happen to the vineyards upon the death of the parent usufructuary, isn't that correct? A. No, that is correct.

Q. And, isn't it true, upon the death of the parent usufructuaries, the children to whom the title had been transferred would be the sole owners of the property? A. Yes.

[4006] Q. Now, those cases fixing the property taxes for one or two or three years, as the case may have been, did not attempt to evaluate the children's interests in the vineyards in any other sense, is that correct? A. I don't quite understand your question.

Q. Perhaps the question isn't very clear. Apart from determining that the parents should bear the entire annual taxes, the cases did not seek to evaluate the children's interest in the vineyards, apart from that annual tax purpose, is that correct? A. Well, what the cases did, was to evaluate the present, that is, the value at the time, of the children's interest and the parents' interest for purposes of the tax.

Q. Annual taxes? A. Yes.

Q. Suppose in either of those cases, the children had a right to a fixed part of the income from the farm, say 50 percent, in your opinion, would the court have reached a different result? A. It would depend whether they had this right under the usufruct agreement as a right in rem or whether they had it as a right under the additional agreement, as a mere claim against the parents. It would depend on the agreement.

Q. Well, take both of those alternatives and give us your opinion? Suppose they had it under the usufruct contract, [4007] suppose the children had a right to 20 percent of the income, as a right in rem in the property, would that be taken into account in the annual property taxes?

> Mr. Baum: Just one moment, your Honor, I think, if I'm not mistaken, Mr. Ennis' question is predicated

upon the assumption in this case that no income was to be paid to the children. If so, it is in error because the case states that after an income of 600 to 750 marks a month, the balance of the income was to be paid to the children.

Mr. Ennis: Which decision are you referring to?

Mr. Baum: The 1933 decision, page three of the English translation.

By Mr. Ennis:

Q. Do you remember the question, Miss Schoch? A. Well, I thought that I did not understand your question correctly.

Q. Would you like me to restate it? A. Yes, if you would please.

Q. Suppose the usufruct contract whereby the parents gave their children a vineyard, stated that 20 percent of the income from the vineyard should go directly to the children, not merely as a contract right against the parents, would the court take that into consideration in fixing even the annual property tax? A. Yes, the court would.

[4008] Q. Thank you. Now, accepting in general the facts stated in these two opinions which involve a vineyard and another farm property, would these decisions on annual property taxes have any bearing if the question arose as to fixing a gift tax on the transfer to the children reserving usufruct? A. I don't think so.

Q. And it may very well be that a German court would place a value on the children's interest in determining what tax should be made on the gift, isn't that correct? A. Yes.

Q. And there is nothing in these decisions to indicate that no value would be placed on the children's interest? A. That is correct.

Q. Now, one final question on these two decisions. If these parents died immediately after the court decided that they should pay all the annual taxes, their children would get the property completely, would they not? A. Yes.

Q. You referred, Dr. Schoch, to the use in the German Alien Property Law of the concept of economic ownership? A. Yes.

Q. Is that correct? A. Yes.

Q. Are you aware of any decision of the German court holding that the existence of an enemy usufruct, enemy from [4009] the German point of view, of course, in property of which the legal owner was a German, and therefore, not an enemy, would subject the legal owner's interests in the property to confiscation as enemy property? A. I'm not aware of any cases under the German Alien Property legislation because these matters were handled administratively and questions of this type simply did not go to the courts, so the courts had no occasion to decide, as to the first point.

In the second place, you were assuming the existence of a straight usufruct with nothing more.

Q. That is correct. That was my question. A. In that case, the German authorities administering the enemy property legislation would consider the usufruct as enemy property.

Q. And not the legal owners' interest in the property? A. That is correct.

Q. Thank you. Going back one step, Miss Schoch, to my question about the gift tax, am I also correct that these decisions on the annual property taxes, chargeable to the usufructuary in these two cases, would not govern the determination of the levy of the estate tax on the interest of a usufructuary and a legal owner in property, is that correct? A. Yes, I think that is correct.

Q. Miss Schoch, apart from the decisions under the [4010] annual property taxes, to which you referred, and apart from this concept of economic ownership, which you said was recognized also in such public control laws as the foreign exchange control laws and alien property laws, do you know of any decision under the Civil Code, any decision of any German court under the Civil Code stating that a usufructuary was the beneficial owner of the property to the exclusion of the legal owner in a straight usufruct? A. There are no such decisions under the civil code.

Q. You did state, Miss Schoch, if I'm correct, that this doctrine of economic ownership, recognized in such special laws as the foreign exchange control laws and alien property law, was to a degree at least, imported into the general civil law by the reference in Section 872 of the Civil Code, which speaks of—perhaps you can help me out—my note says: "Possession as proprietor or possession owner"? A. Or proprietary possessor.

Q. Do you know of any case, Miss Schoch, where that proprietary possession was applied to describe the interests of the usufructuary under the German Civil Code? A. No, the usufructuary is not a proprietary possessor by virtue of the usufruct. But, may I add an explanation. I don't think, at least I did not intend to testify that the notion of economic ownership was imported into the civil code, but rather, the tax courts took the notion of Section 872 of the [4011] Civil Code, used it for their tax purposes, and used it as one instance of economic ownership.

Q. But apart from taxes, if the usufruct and a legal owner got into disputes in the court about their respective interests under the Civil Code, which are set forth in some detail under the Code, I believe this Section 872, wouldn't be applied to that relationship of legal owner and usufructuary, am I not correct? A. It could be applied.

Q. You don't know of any case in which it has been? A. It could be applied if the usufructuary, in addition to his possession by reason of the usufruct, also possessed the property as if he were the owner. In other words, if as in these tax cases, he had a usufruct plus, then, for certain purposes, he would be regarded as the proprietary possessor and would get the benefits of certain provisions of the Civil Code with regard to a proprietary possessor.

Q. Do you know of any case apart from the tax cases discussing a usufruct who had this undefined plus which you mentioned? A. No, I don't know of any such case under the Civil Code.

Q. I think perhaps I can conclude with one more question, Miss Schoch. Apart then, from these tax situations, these annual property taxes, you cannot assist us by calling to [4012] our attention any German decision in which a German court considered as valueless, the rights of a legal owner in property subject to a usufruct, is that correct? A. I cannot give you any cases under the Civil Code in which the property rights of the usufructuary and the legal owner were divided and the reason which my friend, Professor Kronstein, has explained is that the Civil Code, generally speaking, as the private law in Germany does not provide for situations in which such a division takes place, except again, referring to Professor Kronstein's testimony, where by agreement between the parties, a usufruct is terminated and capitalized. Then, of course, the parties may agree as they see fit. That is the reason why we have no cases.

Mr. Ennis: Will you make these Plaintiff Intervener's Exhibits No. 16 and 17.

(Plaintiff Intervener's Exhibits No. 16 and 17 were marked for identification.)

By Mr. Ennis:

Q. Miss Schoch, are you familiar with the Wang translation of the German Civil Code into English and the Lowey translation? A. Yes, I am.

Q. Miss Schoch, I show you Plaintiff Intervener's Exhibit No. 16 for Identification and Plaintiff Intervener's Exhibit No. 17 for Identification. Will you tell me, if you [4013] know, whether they are respectively the Wang and the Lowey translations of the chapter in the Civil Code which deals with the usufruct? A. Well, I think from the print, I can identify this one (indicating) as the Wang translation and then the other, I take your word for it.

Q. Now, is it not correct, Miss Schoch, that these articles of the Civil Code, Article 1030 to 1089, set forth in some detail, the interests of the legal owner and the usufructuary and their respective rights and obligation in the property? A. That is correct.

The Court: Suppose the Code doesn't deal with a particular agreement, which I understand you to say, would be true in this case of Mr. von Opel's, that agreement would change the ordinary usufruct as defined in the Code, and suppose the agreement itself, didn't clearly spell out what division would take place, how would they proceed in the case of a dispute? I mean, we have a court of equity here; I don't know what they have over there. How would they proceed?

The Witness: Are you assuming a case where the parties, by agreement, divide their interests and capitalize the usufruct, so to speak?

The Court: Yes, where they do somewhat, as is claimed was done in this case, they created a different usufruct, as I [4014] understand, from the one that is dealt with in that Code?

The Witness: I misunderstood, your Honor.

The Court: That was a key turned over to the agent of the usufructuary and a certain claim that he had a right to sell or transfer or dispose of it, and yet, there isn't any clear definition as to how, in case a dispute came about, how it would be disposed of. How would you do it?

Over in this country, we might have some proceedings in a court of equity to do it. I don't know how refined it might be. We have certain guides here. Do you have any guide there other than the tax court guide?

The Witness: I don't think there would be any guide except the judge's discretion in interpreting the entire agreement of the parties, that is, the usufruct agreement, plus the agreement which gives the usufructuary complete control of the property and so on.

The Court: So that the judge, as was done in the tax cases, a judge in a case that isn't specifically covered by this Civil Code, would apply certain types of principles, is that right?

The Witness: The judge would apply, in general, principles of interpreting the intention of the parties.

The Court: I see.

By Mr. Ennis:

Q. Miss Schoch, I would like to make one thing, if I [4015] can, very clear. When you were answering Mr. Baum's hypothetical question about a usufruct having this indefinable plus, you were not testifying, were you, that indefinable plus of control or rights of disposal, whatever that is, was to be found either expressly or impliedly in the gift agreement Exhibit 5, were you? A. No.

Q. You were answering that question, not on the basis of the gift agreement in this case, but on the basis of the gift agreement plus Mr. Baum's hypothetical addition? A. That is correct.

The Court: What is that?

Mr. Ennis: That is very important. Subject to my friend's correction, he said, suppose, in addition to the usufructuary, in addition to his rights under the contract, he has complete control and disposal of the properties.

The Court: I remember that.

Mr. Ennis: I said I wasn't quite clear whether disposal meant sale and subjecting the proceeds to the usufruct and the rights of the owner or whether it meant sale and the usufructuary appropriating the proceeds to himself, to the exclusion of the legal owner. That never was settled, as a matter of fact, on the record, to my opinion.

The Court: I thought that was the point. I wanted to make sure.

[4016] Mr. Ennis: That is correct, your Honor.

By Mr. Ennis:

Q. For example, Miss Schoch, in these rather clear provisions of the Code, which I will not labor, Section 1055, for example, states, does it not, that the usufructuary is bound to return the thing to the owner after the determination of the usufruct? A. Yes.

Q. It contains a number of provisions restricting the usufructuary in the manner he deals with the property? A. Yes.

Q. And subjects him to the obligations of reasonable husbandry, isn't that correct? A. Yes.

Q. And throughout the Code, recognizes that there are two in rem interests in the property, the legal owner's and the usufructuary's, is that not correct? A. Oh, yes, I'm not denying that.

> Mr. Ennis: I offer in evidence, your Honor, Plaintiff Intervener's Exhibits 16 and 17, the two English translations of these provisions of the Code. I might say this, your Honor, that I'm not asking your Honor to take the law from these English translations of the German Civil Code. Your Honor will take the law from the experts and if there is a conflict of the experts, your Honor is in the difficult position of being [4017] the German law expert, yourself, in a sense, but if I were the Court, I would like very much to have available to me, in considering the testimony, the general scheme of a usufruct in the Code, how it is set up, and this is offered to your Honor for background purposes in evaluating the testimony.
>
> I'm not asking you to take the law from the Code as distinguished from the experts' testimony.

Mr. Baum: If your Honor please, my first objection to these documents is that we do not concede that either of these translations is a correct translation of the German Civil Code. We think that they are wrong in several respects and in other respects, they may be correct.

By putting them in now, without objection, I think we would concede their correctness which we do not do. In the second place, your Honor, in view of Mr. Ennis' statement, I don't think they are in evidence if they are not to be relied on by your Honor.

If your Honor is limited to the testimony of the experts and the provisions of the law as they have testified to them, then I don't know that these documents going beyond or around that would have any bearing on this matter.

The Court: I think your first point may be valid because she gave it a very cursory examination. But, the second point, I think I have just as much right to look at that as one of those opinions, bearing in mind, as Mr. Ennis says, I always [4018] have to base whatever I say on the testimony of the witness. However, I do think, Mr. Ennis, if he makes the point of authenticity of the translations, we better have a little more study made of it.

Mr. Ennis: As to that point, your Honor, I would accept, sight unseen, any correction that Miss Schoch would care to make in these translations at any time.

The Court: Why don't you just leave it with her overnight and then stipulate it in evidence with any corrections she wants to make. She undoubtedly can sign one or the other. If you have to have special evidence on it, I will hear it.

Mr. Ennis: Well, your Honor, I wouldn't like to limit Miss Schoch and Dr. Kronstein to overnight. Since your Honor won't need them, couldn't they have a little more time?

The Court: Certainly.

Mr. Ennis: We will have no difficulty in agreeing on it, your Honor.

The Court: I don't think you will.

Mr. Baum: That is perfectly agreeable.

The Court: Subject to stipulation as to accuracy by the two of them, I will receive it in evidence.

(Plaintiff Intervener's Exhibits Nos. 16 and 17, were received in evidence, subject to stipulation.)

Mr. Ennis: I have no further questions, your Honor.

[4019] *Redirect Examination by Mr. Baum*:

Q. Dr. Schoch, I would just like to ask you a very few questions. In the first place, just to set the record straight, Mr. Ennis kept referring to the annual property tax and I believe you said that it was a tax assessed for three or four years at a time? A. Yes.

Q. Was it paid annually? A. Yes, it was paid in annual installments, but it was assessed for a number of years at a time.

Q. And, as a matter of fact, in Germany, Dr. Schoch, was it not correct, the tax was assessed in 1931, 1935 and 1939? A. Yes, that is correct.

Q. And, in the years between, the parties paid what had been assessed previously? A. Yes.

Q. Dr. Schoch, toward the end of Mr. Ennis' examination, he asked you about certain restrictions of the Civil Code as contained in some of the sections between 1030 and 1089. Can those restrictions be modified by agreement of the parties? A. Yes.

Q. Now, with respect to Section 872 of the Civil Code, [4020] Dr. Schoch, embodying the concept of proprietary possessor, what part of the Civil Code is that section contained in? A. That is contained in the third part of the Code, which deals with the law of property. That is the same part of the Code which contains the provisions on the usufruct and other rights in rem.

Q. Now, Mr. Ennis referred to an estate tax in connection with the decisions to which you referred. Is it not correct, Dr. Schoch, that in a case where you have a usufruct for the life of the usufructuary, the estate tax comes into question only when the usufruct comes to an end? A. Yes.

Q. Referring now, Dr. Schoch, to the German Enemy Property Act, to which you have testified, is there any provision in the German enemy property legislation which gives a person a right of action in the courts to recover property which has been seized? A. No.

Q. Now, Dr. Schoch, Mr. Ennis asked you to assume a state of facts where the donor transfers 100 shares of stock to the donee, and reserves the usufruct, but the usufructuary only puts 97 shares under the usufruct, only delivers possession of 97 shares, shall we say, to the usufructuary and not the other three shares, and I believe, you testified under those facts, that the donee would be entitled to the income [4021] of those three shares, is that correct? A. Yes.

Q. What would be the rights of the donor under an agreement providing for a usufruct in 100 shares or in all the property as to those three shares? A. The rights of the donor, with regard to the three shares, would, of course, be a right to demand the establishment of a usufruct in these three shares in accordance with the agreement.

Q. And procedurally, how would the donor demand the establishment of the right? How would he go about getting it? A. The donor would sue and he would sue to obtain a judgment ordering the donee to establish the usufruct.

Q. And assuming, Dr. Schoch, that the agreement merely stated that the usufruct in all the property is reserved to the donor and then you have this situation where three shares have not been delivered, would there be any conditions attached to the donor's right to recover in a German court on his claim for the establishment of the usufruct? A. Not on these facts, no.

Q. Dr. Schoch, this decision of the Supreme Tax Court of 1933, is that decision referred to in any other German publications? A. It is referred to in textbooks and commentaries on the tax law as one of the leading cases dealing with and [4022] defining economic ownership within the tax law.

Mr. Baum: No further questions, your Honor.

The Court: Let me get one thing straight. I have to get this straight in my mind. I must have misunderstood Dr. Kronstein, but I gathered from what he said, that independently of any entertainment of respective interests of parties, in tax determination in Germany, there would not be any actual divisions as between the parties at any time. Is that correct?

The Witness: That is correct, your Honor.

The Court: There isn't any such thing as determination of the interest and having once determined those interests and splitting them up—

The Witness: No, your Honor, there can be determination, of course, of rights.

The Court: You can determine them?

The Witness: You cannot, at the request of one party, make division. You can only make division by agreement of the two parties.

The Court: I see, and if there is no agreement, there wouldn't be any division to make it possible at any time?

The Witness: The usufructuary cannot go to court and say, "I want my usufruct to be capitalized in one lump sum," nor can the owner do this.

The Court: That is what I understood him to say and I wanted to be sure about that.

[4023] *Recross Examination by Mr. Ennis:*

Q. Did you identify the publication in which this tax decision has been referred to in your last answer? Perhaps I didn't hear it? A. No, I did not identify it.

Q. Just for the fullness of the record, will you identify it? A. I have come across that decision in various publications. In fact, I have here (indicating) just a small and handy commentary on the property tax law, which I think refers to it, if you will let me look it up.

Q. I didn't want to make a point of it, but I merely thought you might not have completed your answer. A. I have not made a note of the citations, but I am sure that

I will find it here. This is just a briefly annotated text of the property law published in 1940. The author is Weckerle, W-E-C-K-E-R-L-E. He is the Chief Justice of a tax court. I also remember finding a reference to that case in Buehler's treatise on the tax law.

Q. That is fine. I don't want to elaborate. A. One or two others I have not noted because I was mainly interested in the decision.

Q. I might—if it would be of any enlightenment to the Court, I certainly don't know what the answer is, but isn't it [4024] not conceivable, that if property subject to the usufruct was somehow destroyed or reduced to cash, that the parties might ask a German court to divide it between them? If the farm, for example, was destroyed by some blight, and in place of it they had some insurance money, might they not conceivably get the court to divide it between them? A. I don't think so.

Q. They can take the insurance money and put it back in other property? A. That is correct, yes.

Mr. Ennis: I have no further questions of Miss Schoch.

(Witness withdraws from the stand.)

Mr. Ennis: I would like to call Dr. Kronstein, since he has heard the testimony, and ask him the one question as to how he would apply these two tax court opinions.

Mr. Baum: I just wanted to make a brief statement, your Honor. That does complete my case with one reservation, which is in the nature of an alternative, which we will discuss, I believe, shortly, that is, that if your Honor grants permission for Counsel to bring in the witness, von Bibra, I would like permission to bring in a witness from our overseas office, Mr. Charig, who will testify only in the event Mr. von Bibra does. He is not an independent witness. It will be for the purpose of contradiction.

[4025] The Court: I will come to that later.

Mr. Ennis: We are leaving that for the last thing, your Honor.

Mr. Baum: If I may be permitted to interrupt once more, your Honor, in going over the record, I find Exhibit 129 and 129-A, I neglected to offer in evidence although I had it marked and I would like to make that offer now.

Mr. Ennis: May I know what they are?

Mr. Baum: One of the documents you produced, a letter from Dr. Timar to Mr. von Opel.

Mr. Ennis: If it is a letter to Mr. von Opel, your Honor, we do not object.

The Court: All right, they will be received in evidence.

(Defendant's Exhibits No. 129 and 129-A were received in evidence.)

Thereupon, Dr. Heinrich Kronstein called in rebuttal by Plaintiff Intervener was examined and testified as follows:

Direct Examination by Mr. Ennis:

Q. Dr. Kronstein, you have heard Dr. Schoch's testimony for the defendant this morning— A. Yes.

Q. —have you not? [4026] A. Yes.

Q. And you have read the two German court opinions, Defendant's Exhibits 153 and 154, have you not? A. Yes.

Q. And in your own testimony, you discussed how German tax decisions in German tax doctrine might be applied to the problem of evaluating the interest of a usufructuary and the legal owner in a property subject to a usufruct, have you not? A. I made an express statement that property tax cases cannot be used for any consideration as to how the division of property can take place.

Q. Will you state, Dr. Kronstein, your opinion as to the application of these two annual property tax decisions to the problem of evaluating the rights of a legal owner and a usufructuary? A. I believe that these two cases do not help us at all. I have considered this problem in the preparation of my testimony, too. First, I wish to state what the issue in these two cases were: Both cases deal with small farmers, parents and children living together.

In one case, the 1933 case, the parents had already withdrawn from their regular farmers' work. In the other case, the parents continued to work. In both cases, the parents had to pay the property tax every year and in the findings of the value of their property, this farm was included.

[4027] In both cases, the parents make some legal transaction with the children for the purpose to deduct this property from their annual tax.

The tax court says that we have to use and apply an economic interpretation of the factual situation in finding who has to pay the property tax. We say that the parents in both cases continue to have the same income and, therefore, the people practically had no money income. All the income was food.

In the case of 1933, it says that if there is more than 750 marks, then it goes to the children. Then, in the next paragraph, that since 1923, there was no profit and from 1915 to 1923, there was only a very small profit, and what the children had was practically nothing but to eat.

In the other case, it is the same. Therefore, if the court says in such a situation, we assess a property tax, nothing would have happened. But, that has nothing to do with the question of what the value of the title rights of the children are because if the parents die tomorrow morning, the whole property goes to the children.

As Dr. Schoch says, there is no case in the civil courts to divide the property. What could happen was this: The usufructuary and the owner could agree that they subject themselves to either arbitration or to any other type of judge to capitalize the interest of the usufructuary and get rid of it.

[4028] Then, you would have the problem, as I testified before, and you would certainly then use the general principle of good accountancy to find out how much you have to evaluate the interest of the usufructuary and how much the interest of the owner, but nothing could be learned from these cases for this particular decision.

Therefore, these two cases do not say anything about the value of the interest of an owner in the case of a usufruct.

Q. Dr. Kronstein, even taking the facts of those cases, if it became necessary to assess a gift tax as distinct from this annual tax, would, in your opinion, even the tax authorities place a value on the children's interest in these vineyards for gift tax purposes? A. Certainly, and also the problem might come up in the property tax of the children. This case only deals with the property tax of the parents. Whether the children have a property tax, whether any evaluation of that isn't the case is not discussed in these cases at all because here the parties made a certain agreement for the purpose to deduct the property from their taxes and the court said, "No, sir, that you cannot do." That is all.

Q. In your opinion, Doctor, from your knowledge of the whole subject of German law in this field, would you be able to state whether even in cases of annual property taxes, in some situations a value is placed on the legal owner's interest [4029] in the property? A. That depends very much on each element of the facts.

Q. And, in your opinion, these decisions are based upon the special facts which reserve the rights of the parents? A. As I mentioned before, in the 1933 case, it was agreed that the children shall have income in excess, I believe it was 750 marks, but then the case goes on to say that for years, there was no income. Therefore, since certainly for the assessment of taxes you have to look at the facts, therefore, there was nothing to be taxed at this point.

Q. In your opinion, these would be rather special cases on their facts, is that true? A. These are cases that don't go beyond the facts. They might be important for their definition of the idea of economic property in tax cases, property tax cases especially, but we cannot use these exceptional cases and bring them into the Civil Code with which they have nothing to do.

The Court: As I understand, you have had several deals, with what is generally recognized as a usufructuary interest?

The Witness: Yes, sir.

The Court: And that is quite specific, isn't it?

The Witness: Very specific.

The Court: And that is what has been offered in evidence?

The Witness: Yes.

The Court: As I understand it, if the parents were to go [4030] beyond the usual usufructuary agreement, which is recognized in that Civil Code, and they were to agree that the interests would become split, then you said it would go to arbitration, right?

The Witness: That is the only practical solution which there would be. It is very difficult to imagine a judicious—

The Court: What would the court do, would he take into account the age of the parties?

The Witness: He would, I believe, do exactly what I believe every accountant would do, to see what is the estimated value of the profit of the business and what is the income which can be expected from this business. He would take the life expectancy of the people and he would then make an estimation of the value which the owner has to pay out to the usufructuary to end the usufruct. I believe that is the only thing he could do.

By Mr. Ennis:

Q. One further question, does the phrase, "Proprietary possession," as used in 872 of the Civil Code describe correctly under German law the interest of a usufructuary and the usufruct under German Civil Code? A. Once you know that someone possesses something as a usufructuary, you cannot apply Section 872 anymore.

Q. Why? A. Because Section 872 says that who possess a good as if [4031] it were owned by him. He is a proprietary owner, but if I possess something with a specific and special title of usufructuary or a mortgagee, I do not own or possess under the pretension of ownership or under the appearance of ownership. I possess it under the appearance of a usufructuary, exactly what I am, and therefore, this Section cannot be applied in the cases of a usufruct.

Mr. Ennis: Thank you. No further questions.

Cross Examination by Mr. Baum:

Q. Doctor, in the beginning of your rebuttal testimony, you said, I believe, that these cases involved small amounts of property, is that correct? A. I think they amount to small farmers.

Q. Is that of any significance legally, Doctor? A. Tax cases have to consider all elements of life involved and in that evaluation interpretation, what happened between these parties, we cannot disregard the fact that here the question was whether the title owner had to eat and not to obtain any money.

Q. Doctor, do you really mean to say that the German Supreme Tax Court has one rule of law for a small farm and another rule of law for a bigger estate? A. I don't think I have to answer that question.

Mr. Baum: I submit, your Honor, that is a fair question.

[4032] The Court: I guess what he means is that he didn't take that position.

The Witness: I want to say certainly, the court has to consider all pertinent facts and it is a pertinent fact that this case deals with farmers.

I come from a wine country myself. I know the wine vineyards in this part of Germany. I love this part of Germany and I can tell you a little bit how the people live there. These people live in some narrow—

Mr. Baum: If your Honor please, I think this is improper.

The Court: If I get his point, you correct me if I'm wrong, your point is where a usufructuary is established in order to assure some means of existence to the owner, your rule would be different from that where you had a large estate and no such problem involved?

The Witness: Yes, but let me add, in the second case I have here, I should go into this. The question is this: The son is worried that the parents might make a will and give this property to someone else. Therefore, he insists that the parents, in their lifetime, transfer the title to him and keep the usufruct for themselves, so that now, the son has no worry any more that the parents might give this property to someone else. But, he works on the farm; he eats on the farm, before this contract or this title was made and after the title was made and, therefore, the court said that for the purpose of [4033] the evaluation of the property tax of the parents, nothing was changed entitling the parents to deduct this right from their taxes. That is what this case says.

By Mr. Baum:

Q. Directing your attention to the 1933 decision, Doctor, could you please tell me where in the decision it says that this is a small vineyard or small amount of profit? A. I have the German here.

> Mr. Ennis: Could you use the English translation, Doctor? I will hand it to you.
>
> The Witness: It says, page three, paragraph 2, "This arrangement in connection with the uncontested fact that the vineyards have not yielded any profit since 1923 and that from 1915 to 1923 they yielded profits covering only small portions of the stipulated minimum amount to be distributed to the parents, so that consequently the children so far have received practically nothing, makes it apparent that the parents and the children regarded and treated the vineyards as being beneficially owned by the parents," and so on.
>
> So, I take from the fact that there was no income for so many years, that it has to be a small farm.

By Mr. Baum:

Q. Was it normal practice in Germany, Doctor, to have a small farm tax case go all the way up to the Supreme Tax Court? [4034] A. There can be many reasons why that goes. That might be the whole neighborhood of the farmers and they might have a similar problem and it might be a test case.

Q. In any event, Doctor, I don't want to quibble, but you are assuming this is a small property from the fact that there was no profits? A. No income for so many years.

Q. Very good. I think you also said that the parents had retired. Were you speaking of the '33 decision? A. In 1933, they have leased the property already before to the children, so it is a pact; it is more than a lease and from this, I say that they are not operating farmers anymore but that the children are already operating farmers.

Q. Doctor, would you direct your attention to the sentence in the middle of the incomplete paragraph on page three of the English translation which reads:

> "In the lease agreement of Easter 1924, the children declared that the conduct of the enterprise was 'formally' placed in the father's hands and obligated themselves as leasees to cooperate with their father to the best of their ability in maintaining the enterprise."

That would indicate that the father was still active, could it not? A. It goes on to say that the parents shall only receive an [4035] amount sufficient to support them in the style of living to which they are accustomed, so it might be that you are right, that in 1924, the father at the time was operating with the children, but he had already called the children in to cooperate with them.

Q. Precisely, Doctor. Now, you said, I believe, and please correct me if I'm in error, that this case says nothing about the value of the interest of the legal owner? A. Yes, I said so.

Q. I now direct your attention to the last paragraph of the decision and I'm now referring to the middle of the paragraph, appearing on page four, which reads:

> "For practical purposes, the formal title of the children was without any significance since it was

> highly improbable, in view of the usufruct right of the parents as described in the foregoing, that a purchaser might be found willing to buy the vineyards alone, prior to the parents' death."

Is that an expression of value of the right of the owner or not, Doctor? [4036] A. That is only said for the purpose of the finding, because in the sentence itself it says that no purchaser might be found willing to buy the vineyards alone prior to the parents' death.

This clearly means that as soon as the parents die, certainly the property goes to the children, and it is not interesting for a farmer to buy something subject to this usufruct of the parents until the death of the parents, but I say it and repeat it: in this decision, it defines the value of the owner, subject to the usufruct.

Q. What the court is saying, is it not, Doctor, is that that owner's interest wasn't marketable, was it not? A. It says that there was no hope in this farm situation, but you cannot compare this farm situation, for instance, with a shares situation.

The other day you asked me the situation, Mr. Baum, that if I have shares subject to co-possession and a usufruct, and you asked me whether I can transfer the title. Certainly, I might go to the bank and get credit on that, but in this farm situation the actual factual situation makes it very improbable that someone will buy this particular property.

Q. Very good, Doctor. Now, let's look at some shares of stock. Let's assume that I transferred to you some shares of stock, and I reserved a usufruct in those [4037] shares and you delivered possession of those shares back to me, as required by the Civil Code, in order to establish a usufruct, and let's further assume that you and I expressly agreed that I was to have full control over those shares, that you would not object to anything that I did with them; do you think you would have an interest that would be marketable? A. I answered that last time. The agreement in this form, if received, could not be marketed.

Q. Thank you, Doctor. A. Might I add one point, Mr. Baum? Nothing in the case of 1933 indicates that in this case the usufructuary was entitled to dispose of the property. They are only entitled to dispose of the wine, but not of the vineyard.

Mr. Ennis: May I have that question read, your Honor? I think you had "dispose" in there again.

The Court: He said he can dispose of the wine but not the vineyard.

(Thereupon, the reporter read the last answer of the witness.)

By Mr. Baum:

Q. I direct your attention, Dr. Kronstein, at the bottom of Page 2 of the English translation, and direct your attention to the sentence which reads: "the parents have reserved to themselves not only the usufruct rights [4038] but all rights of disposition belonging to an owner with the exception of the formal title entered in the land register." A. I just had in mind this sentence when I made this statement. Certainly the court used the word here, the right of disposition. We have to read the first part, giving us the facts of the case.

Under German law, the title owner of a real property is registered in the real property book. The German real property law is very formalistic, almost mathematical.

It is impossible for anyone who is not registered to make any disposition of the real property, to transfer title, to make mortgages, or to establish any other right in rem.

As you read, however, the first paragraph everything becomes very clear that the parent had transferred the title to the children and kept for themselves the usufruct, and then they gave to the children again a lease on the property.

The parents, however, practically managed this business, so they could not under this legal structure as the facts give it, transfer any right in rem as far as the real property is concerned.

They could, however, transfer the fruits, especially the wine, and in the vineyard the wine is very important, especially [4039] if you have to tax the annual property tax to find the value.

Therefore, the court used this language, which might raise some doubt.

Q. Now, Doctor, I am not going to keep you. Mr. Ennis and his Honor both asked you about arbitration. Arbitration in Germany as it is here is what we could call an extra-legal procedure, is it not? A. Yes, an extra-legal procedure.

Q. There are no defined statutes for what an arbitrator would do, are there? You were just giving your best opinion as to what he would do, were you not? A. Under German law an arbitrator is generally bound to follow the law.

Q. You have said, Doctor, that there is no law on this subject, isn't that correct? A. Therefore, I say that an arbitrator couldn't do anything else but what an accountant might do.

Q. Of course, this arbitration would never arise without an agreement between the respective parties, would it? A. No.

Q. It cannot be involuntarily done? A. No.

Mr. Baum: I have no further questions. Thank you, [4040] Doctor.

Mr. Ennis: I have no further questions.

(Witness withdraws from the witness stand.)

Mr. Ennis: Your Honor, I had the opportunity overnight to reflect on your Honor's remark yesterday about the Court of Appeals. I hope that we won't have to go to the Court of Appeals.

Your Honor, on this matter of evidence, either on the Swiss law or independent evidence on plaintiff-intervener's right, and being bound by the findings your Honor made, your Honor will recall I made an offer of proof.

I would like to perfect my record to this extent: I have not offered in evidence the deposition I took before your Honor's ruling either on the Swiss law or on an independent exploration of the facts, independent of your Honor's findings; but I did obtain such evidence prior to your Honor's ruling, and what I would like to do is offer those depositions, not by reading them into the record but as exhibits.

I must say I think frankly, your Honor, in view of your Honor's two rulings that they would be subject to an objection, but then I would have in the record, not all of the evidence that I would have produced if your Honor had ruled differently on the point of Swiss law, but on the point of res judicata;

but I will have some of the evidence which will [4041] at least show, if it were necessary, to an appellate court, the line of proof that plaintiff-intervener was striving to establish.

Therefore, your Honor, at this point I would like to offer as one exhibit, Plaintiff-Intervener's Exhibit 18 for identification, the depositions of Dr. Gmuer, our Swiss expert, and the depositions of three persons, which we took to establish the facts, on which Dr. Gmuer testified as to what the Swiss law would be; namely, Mr. Hegetschweiler; Eugene Meier, who testified previously; and Adolf Gaeng.

May we handle that that way?

The Court: I am in a little bit of an anomalous position that way. You are the ones that talked me into making a choice between one and the other, because I do think the better procedure would have been to take both.

I allowed it, because I thought that it would be expensive for you, and put you to a lot of labor and that you wanted it that way.

Mr. Ennis: Yes, and we took no further evidence.

The Court: Normally, I think I would have taken both and made a finding, I suppose, and I think that procedure is the one that the Court of Appeals approves of; but I was following your proposal in that regard.

Mr. Baum: Only one of them, sir, relates to the Swiss law proposal. The others relate to the more basic position [4042] of whether the findings are binding on this party.

The Court: I think that is all right. It is all right to make the offer. There is only one proposition that I do think is important here.

If I am not going to read those myself or have access to them, I really don't know whether they might touch on supplementary evidence that I do not admit or whether they are in the ruling.

If they are plainly within my ruling, then we are all right. We have a big habit around here of putting things in the record, various exhibits, which do not come within the rulings, and then having them argued on appeal. Such was the case in the Chemie case.

Mr. Baum: You are right, sir.

The Court: There wasn't any suggestion on earth made before me that that record wasn't complete, and I understand the man complained in that argument, and the appeal in appellate court was based on that.

I don't have any pride about it. It isn't a matter of pride. It is just a matter of doing a workmanlike job. I am wondering if I shouldn't read it. If you tell me it is directly within the ruling, then I don't have to read it.

Mr. Baum: I certainly think it is, your Honor.

Mr. Ennis: I think it is, your Honor.

The Court: In other words, I have given you permission [4043] in this case, as you know, to bring out any testimony that is not at complete variance with anything that I have previously ruled.

Mr. Ennis: That is correct, your Honor, and I entirely agree with you.

The Court: As I have it understood now, it is that all of these are at complete variance. That is all I want.

Mr. Ennis: That is correct, your Honor, and I would like to add to this exhibit that part of Dr.

Hoche's testimony which I did not read into the record.

I have tried very carefully to pay respect to your Honor's ruling and only offer in evidence that part which relates to the theory of the case.

The Court: When I practiced law, I did the same thing, so I understand that. There is only one thing that I want to know and that is to be sure that it is within my ruling.

Mr. Baum: I think it is, sir.

Mr. Ennis: I am satisfied it is, sir.

The Court: If both sides are satisfied, then I will accept that.

Mr. Ennis: Both sides are satisfied.

Mr. Baum: Yes. Your Honor, I would like to make a purely formal objection; but on one of the depositions I have a further objection and that is the deposition of Dr. Hegetschweiler, which has been offered. He is a bank official [4044] of a Swiss bank. He was called in Germany to testify about who owned certain safe deposit boxes.

He testified as to Box 1923, about which we heard testimony, but under the Swiss secrecy laws, he refused to produce any documents about any other box or to tell me who was the owner. I therefore think his deposition is inadmissible under the best-evidence rule.

The Court: Let's let the record stand as it is.

Mr. Ennis: Thank you, your Honor.

(Plaintiff-Intervener's Exhibit No. 18 was marked for identification.)

The Court: What is your problem about your other witness?

Mr. Ennis: That is our last point, your Honor. Pardon me, since the original of these depositions apparently have not been filed in the Clerk's office, may I submit this copy as the exhibit?

The Court: Yes, you may.

Mr. Ennis: The last point to trouble you on today, your Honor, is the plaintiff-intervener's request that we will be allowed to present to you in this courtroom the testimony of Mr. von Bibra, the other party to the correspondence with the plaintiff-intervener, which has been introduced into evidence. It is a rather special situation, your Honor.

Ourselves and the Government did try very earnestly [4045] to prepare the whole case so it could be presented to you in one piece, as I think our rather full depositions indicate.

But this exchange of letters came into the plaintiff-intervener's possession, directly into my possession on his behalf very recently a few weeks ago, and we felt then that it was within the demand for papers which the Government had requested, and we at the time we answered that request did not have them, so we determined that we had to surrender them to the Government, but it did place us in the position of requiring the witness to this correspondence, so we were not prepared for it.

I immediately got my client Mr. Fritz von Opel to get in touch with Mr. von Bibra to ask him if he would be willing to come here and testify, because we feel, your Honor, that testimony is much more satisfactory to you than reading the deposition.

The Court: How soon can he come?

Mr. Ennis: He is ready to come any day. The last word that we heard, and Mr. Baum may be able to supplement it, was that the security investigation office required, even for a temporary visitor's visa for a few days, usually a matter of weeks, but they hoped in this instance, since the Department of Justice has been kind enough to ask the Consul to expedite the matter, that the security investigation would be settled by today.

[4046] They said it needed some checking on the details. I have received today a letter from the Consul in which he states—it is dated February 23 in answer to my letter of February 12, in which I urged that the matter be expedited—

The Court: (Interposing) It is certainly a matter of within two weeks, isn't it?

Mr. Ennis: I do hope he would be able to leave Saturday or Sunday and be here Monday. That is what I am hoping for.

The Court: I have gotten pretty much confused between the Capitol and Court. I am perfectly willing to hear him if he will come promptly.

Mr. Ennis: If he does not come, your Honor, it will only be because our Consul in his own wisdom or the State Department in its own wisdom decides not to give this man a visa.

The Court: I think I would like to set by agreement with you a date on which you gentlemen will argue this, because there will be your proposed findings in advance of that. I want to read your trial briefs and your findings before you argue. That means I ought to have them about four or five days in advance if I can, because I have other things to do too.

I would like to hear that before this testimony gets [4047] too cold. How much time do you think you will need for that? Is two weeks enough?

Mr. Ennis: Your Honor, subject to one point, I would like to tell you that I was set preemptorily for trial next Monday in the Southern District of New York, and, of course, this matter which had started took precedence. The court there has only postponed my trial in this criminal case, that will take three or four days, until next Monday.

The Court: It is set for Monday?

Mr. Ennis: If I could have next week free, your Honor, and then plan the following week to prepare the findings, it would be very helpful.

The Court: If you could do that, you could get it to me by the 17th probably.

Mr. Ennis: How about Friday, the 18th, your Honor.

The Court: Then we could probably argue it around the 25th. I will hear Mr. von Bibra any time that you can get him here between now and then, subject to my other engagements; but you can ascertain that through my secretary.

Mr. Ennis: In addition to him, your Honor, Mr. Charig, an official of the Department of Justice, will come over at the same time, and as soon as we get them here, we will advise your Honor, and then we will hear them at your convenience.

The Court: They won't be long witnesses, will they?

[4048] Mr. Baum: Mine will be on only a few minutes.

The Court: Not over an hour or two, are they?

Mr. Ennis: No, your Honor.

Mr. Baum: If your Honor please, I would only like to make this statement. I certainly don't object to having this witness heard, at or before the time you have set for argument, but I do strongly object to any additional postponing of these proceedings for Mr. von Bibra's testimony, because I think there has been a notable lack of due diligence in securing his presence here.

Plaintiffs knew about his testimony in these letters before Christmas; this man did not apply for a visa until three weeks ago.

The Court: Let's set this argument for March 29; unless I have a hearing in Congress that I am compelled to go to, I will set it for ten o'clock on the 29th. I will hear that testimony. And, you will get your proposed findings in here by the 18th. If not, the 21st would be all right.

Mr. Baum: Does your Honor want any additional briefs or just proposed findings?

The Court: I think whatever you want to do is all right, but I think your trial briefs probably and your proposed findings are all right.

You see what I want to get clear, and I imagine your trial briefs get clear, is what each one of you thinks I [4049] should decide, because on some of this testimony as to the German law, right at this minute, I do not know what you are going to argue.

Mr. Ennis: I might add this your Honor, that Mr. Baum and I both feel that as we have tried the case we have learned some facts outside our trial briefs, so on the 25th we will present those.

The Court: You can write anything you wish to submit, and I will be glad to read it, because it will be helpful to me.

All right, then, we will adjourn until further notice on this and as soon as you learn about this witness, you can communicate with my secretary.

Mr. Baum: Thank you for your patience.

Mr. Ennis: Thank you very much for your patience throughout the trial, your Honor.

(Thereupon, at 3:30 o'clock p.m., the Court was adjourned on this matter until further notice.)

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[4053] **Proceedings**

March 31, 1955

Deputy Clerk: The case of Uebersee.

Mr. Ennis: Are you ready to proceed, Your Honor?

The Court: Yes.

Mr. Ennis: May I call Mr. von Bibra?

Deputy Clerk: Do you solemnly swear that the testimony you shall give to the Court in the case now on trial will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. von Bibra: Please have it translated.

Mr. Ennis: If Your Honor please, Mr. von Bibra speaks some English, I have spoken to him in English, but he doesn't customarily speak in English and he would rather speak in his own language.

The Court: Do we have an interpreter?

Mr. Ennis: Yes, Miss Schoch has agreed.

The Court: Both sides stipulate and agree Miss Schoch will be the interpreter.

Deputy Clerk: Do you solemnly swear you shall well and truly interpret to the witness called to testify on the case now on trial the oath which shall be administered to him and that you will well and truly interpret unto the witness the questions which shall be propounded to him by the Court and counsel, and the testimony of said witness delivered at the trial of this case, so help you God?

[4054] Miss M. Magdalena Schoch: I do.

(Thereupon Miss M. Magdalena Schoch, 6817—25th Street, North, Arlington 13, Virginia, having been duly sworn, acted as interpreter for Mr. von Bibra.)

THEREUPON BARON SIGISMUND VON BIBRA called as a witness by the plaintiff-intervener, being first duly sworn, was examined and testified through the interpreter as follows:

Direct Examination by Mr. Ennis:

Q. Please state your full name. A. Baron von Bibra.

Q. And your residence address? A. Irmelshausen near Mellrichstadt, Germany.

Q. What was your occupation on September 1, 1939? A. Counsellor of legation at the German Legation in Bern.

Q. How long were you stationed at that legation? A. From August 1, 1936, to the end of April, 1943.

Q. When did you enter the German diplomatic service? A. 1920.

Q. Will you state very briefly what positions you held in the diplomatic service? A. From 1920 to 1922, courier. As long as Reichschancellor Cuno was chancellor, I was his secretary, 1923. Then [4055] I was active in the Foreign Office. In January 1927, I went to Rio de Janeiro and I returned in November, 1930. Then I stayed in Europe for six months and then I was sent as secretary to the legation at Prague until July 1936. From August 1, 1936, to the end of April, 1943, I was at Bern, and the rest I have told already, I was at Madrid.

Q. How long were you at Madrid? A. From May 3, 1943 to January 30, 1946.

Q. What was your position in Madrid? A. The last position was that of a charge d'affaires.

Q. And as charge d'affaires were you in charge of the German Legation in Madrid? A. Yes.

Q. And what did you do after you ceased being charge d'affaires at Madrid? A. I waited until the plane arrived, because I thought it the right thing to do, to fly back to Germany.

Q. And what happened to you when you returned to Germany? A. I was imprisoned.

Q. You were held in detention for some period of time by the American authorities, is that correct? A. Yes.

Q. How long? A. Nearly two years.

[4056] Q. Did you have a denazification trial or proceeding? A. Yes, two more years.

Q. What classification did you receive in that proceeding?

Mr. Baum: Your Honor please, I will object to this question as not asking for the best evidence. I make that objection very wisely, because we have been endeavoring to discover where this denazification file is. Mr. von Bibra has given various information as to where it might be located, but it is never in the place it is said to be and here he is testifying and we don't know where the best evidence is.

The Court: What is the pending question?

(The question was read as follows: "What classification did you receive in that proceeding?")

The Court: Wouldn't he be able to tell that? I mean, you might contest his testimony, but wouldn't he have actual knowledge of it?

Mr. Baum: He certainly has actual knowledge of it.

The Court: That is what he has to testify from, let him testify from his actual knowledge.

Mr. Ennis: I will repeat the question.

By Mr. Ennis:

Q. What classification did you receive at your denazification proceeding? [4057] A. I was discharged, this discharge was appealed, the matter went to a high instance and I was again discharged. Because I was the only one who had been abroad all the time, I did the matter without an attorney and I felt that I could be classified into a more serious category because I had held the position as counsellor at the legation at Madrid, but I felt that I had done nothing different from what an English or French diplomat did.

Q. Therefore, you received this classification of discharge? A. Yes, after two years.

Q. What did you say your position was at Bern, at the German Legation in Bern? A. I was counsellor of embassy and in charge of party matters. In this way, I held the highest position in the party in Switzerland.

Q. By the "party," you mean the Nazi party? A. Yes.

Q. When did you become a member of the party? A. In March 1933.

Q. Were you second in command at the legation in Bern, under the minister? A. Until the outbreak of the war. After the outbreak of the war, the charge d'affaires came from London and he was older than I was and he was the representative of the minister, [4058] under him I came. He is now ambassador in Athens.

Q. What is your present position, if any, in relation to the German diplomatic service? A. None.

Q. When did you first meet Fritz von Opel? A. Shortly after the outbreak of the war.

Q. Where did you first meet him? A. He came to me at the legation with his wife.

Q. What conversation did you have with him? A. I think he had his ski accident and his leg was broken and he had received military orders from the consul in Davos, and the consul was a little difficult to deal with, he was a little, what you would call a Nazi.

Q. What did Fritz von Opel tell you? A. Whether I could help him since at present he couldn't play at being a soldier.

Q. Was there anything else said in that conversation? A. I think at that time already we discussed where his wife came from and I believe that we found there was some relations between her and an aunt of my wife. And thus it happened that I called up my wife and the Opel couple had supper with us, but it is possible that that happened after the second visit.

Q. Do you recall anything that you said to Mr. von Opel about this problem of military service? [4059] A. When a man arrives with a broken leg, the question is not very acute.

Q. You don't recall any advice you gave him? A. I am sure I told him that the consul at Davos was a little difficult, that if he should get into any difficulties, he should come to me.

Q. Did you have any conversation with Fritz von Opel about his German citizenship? A. At the first conversation?

Q. Well, do you recall whether you had any conversation about citizenship at the first conversation? A. It may be, but I don't remember.

Q. Do you recall any subsequent conversation about the question of Fritz von Opel's citizenship? A. Lots.

Q. Where did those conversations take place? A. I think at my house, certainly at the Hotel Dolder at Zurich, and I think at the home of the von Opels at St. Moritz.

Q. Will you state, so far as you recall, what was said in those conversations about Fritz's citizenship? A. To the extent that I can do so, after 15 years.

Q. Well, you state what you remember of the conversations about citizenship. A. A year ago, I practically didn't remember anything [4060] about the matter because it didn't seem interesting to me. Finally, I was questioned. And a few days ago, before I flew over here, Fritz von Opel told me several things, and last night I saw everything in English only, so what I can say is very thin.

Q. You mean to say that you don't recall very much that was said about that subject? A. I don't remember whether it was the first conversation or the second conversation, but I remember the line, absolutely sure.

Q. What was that line? A. That Mr. and Mrs. von Opel were in a difficult situation—please say that Mrs. von Opel is in the courtroom and I beg her pardon if I should become indiscreet.

They were very nervous since Switzerland was closed in on the one side, there was Italy on the other side, the danger existed that Germany would attack France via Switzerland and they had the reputation of being immigrants.

Q. What do you mean by "immigrants"? A. Somebody who has left the country because he did not wish to live in Germany because he was opposed to the Third Reich. They were not, because they left Germany earlier but they had that reputation.

Q. You mean they were not immigrants? A. No, but they had that reputation. As an illustration, [4061] I remember that when he was arrested at Gibraltar and the newspapers reported about it, the 100% Nazis said, "Now, the capitalistic pig has escaped us." This, I remember.

Q. Do you recall anything that Fritz von Opel said in your conversations with him about changing his German citizenship to some other citizenship? A. Yes.

Q. What do you recall? A. He discussed this topic with me and I had experience from Rio de Janeiro that it is better for a wealthy man to have another citizenship than to lose everything. For instance, after the first world war, we had a law under which any German who was not registered with the consulate for ten years, lost his citizenship. That was usually just carelessness. But after the first world war, all those who had neglected to have themselves registered, got all their money back and the others did not. Thus, I told him it would be better if he now took another citizenship.

Q. Did he tell you what other citizenship he was contemplating taking? A. I think it was a question of where he could do it.

Q. Did he mention any country to you? A. That was a daily discussion in Switzerland.

Q. Did Fritz von Opel mention the name of any country to you that he thought he might be able to get citizenship in? [4062] A. I think he would have liked to become a Swiss citizen but that it was not possible. He was not little enough for that, very little men could have arranged that in Switzerland, but not he. Servant girls, for instance, became Swiss citizens in great numbers and they had been in Switzerland longer, there were no technical difficulties, but it could not be done in his case.

Q. Did he mention any other country? A. I say this only because this was discussed with practically everybody and, therefore, with Fritz von Opel.

Q. Perhaps, Baron von Bibra, I may be able to help your recollection on some of your conversations. I show you Intervener's Exhibit 6 in Evidence and also Plaintiff Intervener's Exhibit 7 in Evidence. Will you tell me what they are, if you know; do you recognize these papers? A. Until four days ago, it had completely disappeared from my memory, but it is here now. And in Munich, Mr. von Opel showed me only a bad translation, very bad.

Q. Well, take Plaintiff Intervener's 7 which you have in your hand, can you tell the judge what that is, if you know? A. This is not simple and easy to tell briefly, because it touches on the most difficult problems.

Q. Just take your time, all I want you to do, first, is to identify the piece of paper, not discuss it. [4063] A. You can see that the times I have been through have ruined my nerves.

Q. Take your time, Baron von Bibra.

> The Court: Miss Schoch, just tell him if he wants a recess, we will give it to him.
>
> The Witness: I wished to help the man, as hundreds of others, and now it turns against him.

By Mr. Ennis:

Q. Baron von Bibra, you listen to the questions and you answer the questions that I ask you and it will be more helpful to the Court. My question, very simply, is: Is that a letter you wrote to Fritz von Opel? A. Yes.

Q. Now, look at the other exhibit, the other paper, Plaintiff's Exhibit 6 in Evidence, do you recognize that as a copy of a letter you received from him? A. Yes.

Q. Do you recall whether you ever saw those papers between 1939 and this morning? A. No.

Q. I showed them to you this morning just before you took the stand? A. Yes.

Q. Now, before Fritz von Opel wrote you Plaintiff's Exhibit 6 and you replied with Plaintiff's Exhibit 7, did you [4064] have a conversation with him about writing those letters? A. Yes.

Q. Did Fritz von Opel in any of those conversations mention Liechtenstein citizenship to you? A. Yes.

Q. Was there any conversation with Fritz von Opel on the problem or the question whether the German Legation in Bern would report any change of citizenship by him to the German authorities in Berlin? A. Yes. I think I promised him that this would not happen until he was safely in the United States. But subsequently, when he was arrested at Gibraltar and the Nazis got so wild, I refrained from doing anything about it. I locked up the papers and told the Minister that we would keep them locked up so there would be no difficulties.

Q. In addition to these papers, did Fritz von Opel and his wife send you their German passports? A. Yes.

Q. And did you lock those up with the other papers? A. Yes.

Q. Now, Baron von Bibra, will you pick up your letter, Plaintiff's Exhibit 7, and will you look at the third paragraph and the third sentence, which reads:

> "Since you have unequivocally declared that you will relinquish German citizenship only for the purpose [4065] of preserving for the German Reich your substantial assets in the event that America enters the war"—

I will stop there. Will you read that from the German, Miss Schoch?

(The interpreter translated the sentence.)

By Mr. Ennis:

Q. I want you to address yourself to the first part of the sentence in which you say, in effect, that Fritz von Opel told you that the purpose of relinquishing German citizenship was to preserve his property for the German Reich, and I ask you this question: Did Fritz von Opel say that to you in any of your conversations? A. No.

Q. Then why did you write that to Fritz? A. That is not pleasant to say. I wished to help him, but I wanted to exist, myself. It is even less pleasant to say that my government was somewhat primitive. It is stupid, what is said here, because once he was in the United States he could save the money for himself but not for Germany. This I could not have written prior to 1933, but this is the way it went, this was the method by which we had to help.

Q. Now, Baron von Bibra, will you look at the second part of that sentence, which reads:

> "you have reported immediately after the outbreak of the war and offered your services for any activity of whatever kind."

[4066] Did Fritz von Opel offer his services for any activity of whatever kind? A. I think yes, he said if he could help in any way. It is very indiscreet what I am going to say now, in Switzerland there were a great many rich people, the only possibility they had was money. And it was very simple to say if you can help anywhere with money, then I shall be helpful to you, there was no other possibility.

Q. Well, did you understand that he meant helping with money? A. Only if he did that, then I could help him, because the little people in the party were very simple and they were very much interested in obtaining a little money.

Q. And is that the kind of help that you had in mind when you wrote that sentence? A. Yes.

Q. Baron von Bibra, in your position as counsellor at the legation in Bern, did you help any other people? A. I tried it a hundred times—but if it went as wrong as did here—then it is wonderful.

Q. You listen to the question and answer my question. Can you recall any particular instance, while you held your official position in Bern, in which you helped any other German in respect of the German government? A. I don't know where to begin. For instance, the [4067] Bernheimers, a large store in Munich, a well-known store, where all of us used to buy, antiques, we processed them through Switzerland into safety. The owner of the Simplicissimus, Mr. Heine, the former Minister von Ribbentrop lived in his house before 1933 and afterwards he did not reply to any of his letters, and then Mr. Heine came to me because his entire property in Munich was in danger. At that time, von Ribbentrop was still ambassador. Mr. Heine, as an old Jew of 80 years old was nice enough to let me know in 1948 that if I were ever in any difficulties, I should come to him.

Q. What did you do for him in connection with von Ribbentrop? A. I tried to save his house for him.

Q. What did you do? A. At that time, Neurath was still Foreign Minister and he wrote to Neurath explaining precisely the situation, that a Minister who had lived—an ambassador, excuse me, an ambassador who had lived in this house of the Jew before 1933, now did not even reply to any letters, and we asked for help, we wrote several times.

Q. And Mr. Heine told you after the war that he would be glad to help you, if he could, is that correct? A. He let me know from Sweden.

Q. Now, in 1935, while you were a German diplomat in Prague, in Czechoslovakia, did you have any occasion to help [4068] the German Jews in their relations with the German government? A. This was incredibly different. But when it was within our power, of course, we did it. When I was in custody in the camp in Germany after 1945, one of my officials came to see me and told me that I had so many times ordered to give passports to Jews, which was prohibited, and the occasion was so very funny that it is almost ridiculous to tell it here, it was a test case, the attempt to do it. At Berlin, I used to dance with the daughter of Mellon to the music played by the band of Mark Raber and I knew Mark Raber very well but did not know that he was Jewish. In 1935 or 1934, he came to Prague. And the official told me that Mark Raber needed a pass and a lot of other things, but it could not be done because he was Jewish. And I simply said, "We shall do anything for Mark Raber." And it went well.

Q. Did he get a passport? A. Yes, without our having any difficulties, and then we did it more frequently. In particular, we gave the advice, which now is very indiscreet vis-a-vis the Czech government, that in Prague you could buy a Czech passport cheaply and in this way we always helped the Jews. This was basically the best way to help them.

Q. After Germany and England were at war in September 1939, you visited Fritz von Opel's home in St. Moritz, did you not? [4069] A. Yes.

Q. Were there any English citizens staying in his home at the time you visited? A. Yes.

Q. And you stayed there at the same time as English citizens? A. Yes.

Q. In your denazification proceeding, did you receive any assistance from some of these Germans, including Jewish people whom you had helped? A. When I was arrested, radio and newspapers all over the world, because I had been abroad all the time, communicated the news that I had been arrested and imprisoned. And I thought awful things would come out of this, but in fact I received more kindness than I had deserved.

Q. You returned to Germany voluntarily, didn't you, from Spain? A. Yes, because in my opinion, I had not committed anything.

Q. Oh, by the way, Baron von Bibra, you were questioned by Mr. Charig, Mr. Baum's associate and by Mr. Baum in Germany, were you not? A. Not exactly questioned, but very friendly questions.

Q. Well, you had a discussion with them on more than one occasion? [4070] A. Twice, once with Charig alone and then with Mr. Baum.

Q. When you were imprisoned in Nuerenberg by the American authorities, were you questioned about your relations with Fritz von Opel? A. Yes.

Q. Was a written record made of that questioning? A. I believe so.

Q. When Mr. von Opel was held by the British at Gibraltar, did Mrs. von Opel come to you and talk to you about it? A. I think we saw each other during that time.

Q. Do you remember whether you said anything to Mrs. von Opel about Fritz von Opel being detained in Gibraltar? A. This appeared in our newspapers.

Q. Did you give Mrs. von Opel any advice as to how she might help her husband? A. I think yes.

Q. What did you say? A. I told her that she had to do mostly with friends of mine on the other side, because the British was a friend of mine and I was sorry that I could not ask her to give my regards to these people.

Mr. Ennis: Excuse me just a moment, Your Honor. I have no further questions, Your Honor.

[4071] *Cross Examination by Mr. Baum*:

Q. Mr. von Bibra, I would like to ask you a few questions. Did you meet Fritz von Opel or speak to him in December 1954? A. At the end of the year.

Q. Did he come to see you at your home? A. After his attorney had asked me from Darmstadt, from Wiesbaden, he came.

Q. And what discussion did you have with Mr. Fritz von Opel on this occasion? A. He told me about his law suit.

Q. Is that all? A. I don't remember whether then he already asked me to be his witness or whether he asked me that later, I think yes.

Q. Did he talk to you about the two letters which you have before you and which are marked Intervener's Exhibits 6 and 7? A. But he did not have them nor did he have translation, and what he told me about them was so vague that I could not make any sense out of it.

Q. Did he ask you to come here sometime to testify in this court? A. Yes.

[4072] Q. Did he discuss with you what kind of testimony he needed from you? A. I told him I have been questioned several times and I can only tell what I know. Then I came to Munich about three days ago, there I talked to him and there he gave me instructions. But these instructions didn't bring out anything that is different.

Q. What were these instructions, Mr. von Bibra? A. He told me that in an American court, a witness was a witness of the party, that it was different from Germany where the witnesses are not as strictly witnesses of the party. But I told him repeatedly that I could only tell what I knew. I am too old to perjure myself.

Q. And on this occasion, which I believe you said was a few days ago, did you then discuss these two letters which are Intervener's Exhibits 6 and 7 with Mr. von Opel? A. Yes, but then he had these poor translations and my English is not good enough because I have never been in an English speaking country, so that I could not do much with them.

Q. Was that all that was discussed a few days ago with Mr. von Opel? A. There has been so much talk back and forth, it is not worthwhile and it is very difficult to repeat it. I was glad when we went to the theatre afterwards.

[4073] Q. What did he tell you about his law suit in the United States? A. When I was in my first camp in the prison of Hohenaspen, my floor leader was the communist Kaul, who now represents the East German government in the big law suit in Germany which has to do with the suppression of the Communist Party. This Kaul was, in turn, with Mr. and Mrs. von Opel and he took me out of my cell, because I did not have a light in my cell, but he did, being floor leader, and we had time all night long and we heard all the details concerning the law suit for many nights.

Q. My question, Mr. von Bibra, was what did Fritz von Opel tell you in the meetings of the last two or three months about this law suit in the United States? A. After I had seen these letters, I said this seems to be very difficult, but he was so optimistic that he said it is already won.

Q. Now, how many times did you speak to Mr. Fritz von Opel between December 1954 and three or four days ago? A. Continuously over the telephone, because of my trip here. But only with regard to the trip.

Q. Did you meet Mr. von Opel in Munich on the 4th of March of this year? A. No, I was not in Munich.

Q. Had you not been requested to meet Mr. von Opel in [4074] Munich on that day? A. On the third, I talked with Munich over the telephone; but wasn't I meant to come here then?

Q. Wasn't your conversation with Munich on March 3, a conversation with the United States vice-consul in Munich? A. That is possible.

Q. Did you not tell the vice-consul, Mr. Zachary, that you had been asked to meet Mr. Fritz von Opel in Munich on the following day, March 4? A. Now, I remember, yes. He thought I would fly here with him because the visa could be obtained very quickly, but it did not go as fast.

Q. At that time, Mr. von Opel had just returned from the United States, had he not? A. Wasn't that when he flew here? I don't know, they call me up on the phone so frequently. Oh, yes, I told the consul that as far as I knew, Fritz von Opel was coming to Munich on the 4th of

March and he could talk to the consul about the visa and I would not have to go to any more trouble with the visa.

Q. Let's talk about this visa for a minute, Mr. von Bibra. When did you first apply for a visa to come to the United States? A. Two days after Fritz von Opel had asked me and then I had a guilty conscience because of the two days, because Fritz von Opel had made the matter so urgent, but I had other [4075] matters to attend to.

> If he has time, I may be able to ascertain the date. (Looking in his notebook.)
>
> Mr. Ennis: If the Court please, I suggest that this might be material if we did not produce the witness, but I really don't see the relevancy of a discussion of how he got his visa. He got it and he is here.
>
> The Court: Aren't you through?
>
> Mr. Baum: No, Your Honor, I am not. I think it will become very relevant in one minute.
>
> The Court: All right, go ahead, I will hear it and disregard it if it isn't material.

By Mr. Baum:

Q. Do you remember telephoning Vice-Consul Zachary in Munich on February 18? A. I am sure that is correct.

Q. Did you call Vice-Consul Zachary to ask about your visa and did you say to him that, "The visa matter is sausage to me"? A. Personally, I was not too wild about this matter here.

Q. And approximately ten days ago, were you not informed by Mr. Zachary that as a result of the ruling of the State Department, a visa was available for you? A. Yes.

[4076] Q. And do you remember Mr. Zachary or Consul Zachary asking you when you would come in to pick up your visa? A. Yes.

Q. Did you tell Mr. Zachary that you were in no hurry about it and you didn't know when you would come in? A. Yes.

Q. Did you also tell Mr. Zachary that Mr. Fritz von Opel was forcing you to come to the United States? A. No. Compel is too much, maybe that he had the desire. Zachary does not speak German well, maybe he does not understand. He took such good care of me that, when I left him, I told him that I wished that the officials under me had done their jobs as efficiently as his staff.

> Mr. Ennis: If the Court please, three and a half minutes of Mr. Baum's minute to show the materiality of this is up and I don't see any materiality.
>
> Mr. Baum: If it isn't material that a party in this case is forcing a witness to attend a trial, I don't know what is.
>
> Mr. Ennis: He was urging him to attend, he wants Your Honor to have the benefit of his testimony.
>
> The Court: I understand that. Let him prove it and then you can argue about it.

By Mr. Baum:

Q. Now, Mr. von Bibra, let us look for a moment at Intervener's Exhibit 6 and, in connection with that, did I [4077] understand you to testify that before you received this letter, you had some conversations with Mr. von Opel concerning his changing his citizenship? A. Yes.

Q. Did you also have conversations with him after you received this letter? A. Yes, that is in my reply. The reply says that I had hoped that no exchange of letters would be necessary. That means that I would not have to reply in writing.

Q. Now, did Mr. von Opel tell you orally the matters that are set forth in this letter, Intervener's Exhibit 6? A. That is probably so, but I do not remember.

Q. Is it true, Mr. von Bibra, that when Fritz von Opel came to your office the first time, you took a very hostile attitude toward Mr. and Mrs. von Opel? A. Hostile is too much; in our profession, we call it reserve.

Q. Isn't it true, Mr. von Bibra, that you took this attitude, whatever it may have been, because you thought Mrs. von Opel was partly Jewish? A. No, I do not believe that, that would not have made any difference to me. Must I say why I took this attitude?

Q. Yes, go ahead. A. He had the reputation of the Rocket Fritz, and I [4078] thought what does he want of me?

Q. Mr. von Bibra, will you please look at your reply, which is Intervener's Exhibit 7, and I direct your attention specifically to the first sentence of the second paragraph which reads:

> "First of all, I would like to inform you that I have ascertained from the documents which you have submitted to me that you had the question examined in Germany under what conditions you may temporarily assume a third citizenship in order to preserve the substantial assets in the United States in the German interest."

What documents had you examined? A. I did not have anything to examine. I wrote that he had the questions examined in Germany. The letter says that on the basis of the documents submitted to me, meaning this letter, you have had the question examined in Germany.

Q. When you say "meaning this letter," you mean the letter of Fritz von Opel which is Exhibit 6? A. Probably, that is what he says, he writes that he had the question examined.

Q. Let us take this a little slowly, Mr. von Bibra, and I ask you to look once again at that sentence very carefully, and does it not say that Fritz von Opel, in effect, had submitted documents to you? [4079] A. Yes, that is here, it is the letter. That letter contains a number of reasons.

Q. That is the only document you saw, Mr. von Bibra? A. That, I do not remember today, if there's any, it may well be that there are other documents. It is 15 years ago.

Q. Looking at the next sentence, there was also a letter of September 12, was there not? A. Yes.

Q. Do you remember what that letter was? A. I think that letter he did not send to me, but he showed it to me. I think that there I was indignant, wasn't that the business about the million? That is, that somebody in Germany told him that if he paid a million, he could obtain another citizenship, whereupon I told him we are not quite as corrupt as that yet. I think that was it.

Q. Now, I believe you testified in answer to Mr. Ennis' question, that with reference to the third sentence of the third paragraph, and the first part of that sentence concerning the purpose of preserving Fritz's assets for the German Reich, Fritz von Opel did not say that to you, is that correct? A. I do not think that he told that to me, but I wrote it in order to cover myself.

Q. In other words, you made it up? [4080] A. Or one of my officials, who were smarter than I.

Q. How many people worked on this matter, Mr. von Bibra? A. I hadn't time to dictate this letter, myself, I do not believe. But who wrote it, we were at that time already 200 persons at the legation, maybe.

Q. Isn't it a fact, Mr. von Bibra, that this statement in the third sentence of the third paragraph of Intervener's Exhibit 7 is a repetition of what is contained in the letter to you from Fritz von Opel, which is Intervener's Exhibit 6?

> Mr. Ennis: I object to that question on the ground that whether one letter is a repetition of another letter in evidence is to be examined by the Court, it is not a question for testimony of the witness.
>
> The Court: I think that is a valid objection.
>
> Mr. Baum: Pardon me, Your Honor?
>
> The Court: I sustain it.

By Mr. Baum:

Q. Isn't it true, Mr. von Bibra, that you took—I will withdraw that.

Isn't it true, Mr. von Bibra, that if Fritz von Opel did not say to you, as you have testified, that he wished to preserve his assets for the German Reich, that you took that sentence from the letter which is Intervener's Exhibit 6?

> Mr. Ennis: The same objection, Your Honor.

The Court: Well, I don't know, I think I will permit him [4081] to say that, if he has any recollection of it. I shall permit his recollection as from where he took it.

Mr. Baum: Will you read the question?

(The question was read.)

The Witness: Exhibit No. 6, I have not been able to read fully, I have only read the first page but not the second page, because this hearing began at 10:00 o'clock. But probably the way it happened was that I took this letter and gave it to one of my officials and told him to fix the matter and he wrote the letter and I signed it, the reply, probably.

Q. Now, Mr. von Bibra, looking at your letter again, Intervener's Exhibit 7, I ask you to note the last sentence of the third paragraph, which reads:

> "A notation to that effect concerning this matter is in the files of the legation."

Is that statement true or not? A. I cannot answer this question exactly but it is probable that in the course of the usual routine, we attach this letter to the passport, but it is also possible that we made a separate notice for the files.

Q. And did you put this notation or memorandum, or whatever it was, in the regular files of the legation? A. No, this I remember precisely. I locked it up in my safe in my room, because I wanted to let Opel escape first. Then he was seized at Gibraltar and the case was much dis- [4082] cussed and raised difficulties. And then the matter became a hot iron for me and, therefore, I left it in the safe and only when I left for Madrid, I told the minister, "Be careful." This I remember precisely. But what he did with it, I do not know.

Q. Mr. von Bibra, if this letter was dictated by one of your subordinates, as you suggest might be possible, did not he put a copy in the files of the legation? A. No, it is said to have happened, but we were very lucky at Bern, also in Madrid.

Q. Now, Mr. von Bibra, I ask you to look at the next to the last paragraph of this letter in which you say:

> "I am sorry that you had to wait so long for a reply, but I felt that considering the importance of this question, I should reply only after the matter had been checked carefully."

Did you consider it an important question? A. Yes, for him; yes, it was decisive for him. And for us, as far as we are concerned, if you leave the letter without a reply for about four weeks in a matter which is very important for a person, then there is an expression of a guilty conscience. He was anxious for a reply, probably, and in our case it was processed timely, it is true, but still it was processed as a routine matter. I cannot tell precisely, but I think it followed the phrase of apology.

[4083] Q. Is it true, as stated in that sentence which I have read to you, that the matter had been checked carefully? A. Yes, I hope so.

Q. Checked where and with whom? A. Well, if you want to answer this precisely, you have to examine who at that time was in the legation and handled the files. The files are available, after all.

Q. I am merely asking, Mr. von Bibra, for your best recollection as to how the matter was checked, as you said in that letter? A. I suppose we discussed it with the chief of the Consular Department, "Is it possible, can it be done," but that I cannot remember today.

Q. Mr. von Bibra, in the course of your years of service in the German diplomatic service, were there any other occasions when you helped people conceal their assets in a foreign country?

Mr. Ennis: I object, Your Honor, to that question; "any other case," the question assumes—

Mr. Baum: I will strike the word "other," Your Honor.

The Court: All right.

Mr. Ennis: Will you restate the question?

Mr. Baum: I will restate it.

By Mr. Baum:

Q. In the course of your experience in the German [4084] diplomatic service, Mr. von Bibra, were there any occasions when you helped people conceal their assets in foreign countries?

Mr. Ennis: I object to that on the ground it is irrelevant and immaterial on the facts of this case.

The Court: Well, I will permit it.

The Witness: It is better to say "save." Goering issued an order according to which it was punishable by death to have property abroad which had not been reported. The days following this order, we were not able to handle our mail, because these unfortu-

> nate people in Switzerland—because these people in Switzerland said, "We are not Nazis, but we have to travel to Germany, we have to do business with Germany, and we do not wish to commit a crime punishable by death." We received mountains of money and we put that money into separate rooms and we wrote to Berlin, "This is not the way to handle it." Unfortunately, this was a great deal of money because the people were afraid that we would look into the banks in Switzerland. They sent it anonymously and thus it was lost, but all the others got their money back.

Q. Apparently I did not make myself clear and I will phrase the question another way: Did any persons ever come to you, for example, in Bern while you were employed there, to ask your assistance in concealing the ownership of their property, for example, in the United States from the United [4085] States government? A. No, only with Germany, at that time. There was no interest in concealing the property vis-a-vis the United States but only to conceal it from the German government.

Q. I believe you testified, Mr. von Bibra, that you first met Mr. Fritz von Opel in the early days of the war in Europe in 1939, is that correct? A. It is not impossible that I might have met him casually many years ago, but I really met him on that occasion.

Q. And thereafter, did you and your wife and Mr. and Mrs. von Opel become friendly with each other? A. They were so nice as to invite my wife to St. Moritz for two weeks, but I was very busy, and then further things resulted.

Q. In the months following September 1939, did you, personally, see Mr. and Mrs. von Opel frequently? A. Him, I saw perhaps five times, I think I was at his house three times, then I met them in Zurich a few times, Switzerland is very small, you meet people very easily, but how often I can't tell you.

Q. When you visited Mr. von Opel in St. Moritz, did you stay overnight or for several days? A. Each time, the night, yes.

Q. And were Mr. and Mrs. von Opel ever guests at your home? [4086] A. They lived more comfortably at the hotel, but they had their meals at our house. Unfortunately, I am not as rich as the von Opels.

Q. Before December, Christmas of this year, had you seen Mr. von Opel since he had left Switzerland in 1940? A. No.

Q. In the year 1922, Mr. von Bibra, were you an employee of the foreign office? A. Yes, 1922.

Q. Were you stationed in Germany at that time? A. Then I was a courier, I travelled through Europe.

Q. In that year, were you arrested and imprisoned by the British occupation authorities for activities against their interests? A. No, at that time there was no longer any occupation; at least, maybe the way it is in Germany now.

Q. Is it not true that you were imprisoned for eight months in 1922? A. No, I became immediately a secretary of the Reichschancellor. He knows what a Reichschancellor is? He is the highest official.

Mr. Baum: Do you want to suspend, Your Honor?

The Court: Are you going to be much longer?

Mr. Baum: I won't finish if you are going to adjourn at twelve, Your Honor.

The Court: You couldn't finish in five or ten minutes?

[4087] Mr. Baum: I don't think so, Your Honor.

Mr. Ennis: At this time, I would like to request, if the Government has it, copies of the examinations of Mr. von Bibra in respect of Mr. von Opel. I think they might very well corroborate what he has said today, the testimony he gave many years ago. I would like to see those if the Government has them available.

Mr. Baum: This witness has signed a voluntary statement, but I don't think there is any cause shown, under the numerous decisions on this point, for giving it in advance to counsel. I intend to question this witness about it when the proper time comes, and I think it will show a lot of things about his testimony, but I don't think he is entitled to prepare his testimony in anticipation of his own statement.

Mr. Arnold: This is a civil proceeding and the rules of discovery certainly apply to it.

The Court: I can't order him to do it at this juncture, I don't think. If you produce them, of course, he has a perfect opportunity to see them and examine them any length of time and the length he needs to examine them.

Mr. Ennis: Will that statement, Mr. Baum, include the question and answer, I understood from him this morning, that was taken from him at Nuerenberg?

Mr. Baum: There was no question and answer, he was interviewed by Joseph Laufer, whom the Court will remember. [4088] It was merely a conference and at the conclusion of the conference, the statement was taken.

Mr. Arnold: Your Honor, in a criminal case in Alexandria, I was permitted, over objection of Government counsel, that I was entitled to see whatever my client had said to the Government. It seems in a civil proceeding—

The Court: My recollection of the rule is that a witness isn't shown a prior inconsistent statement, allegedly, until it is presented to him; I didn't think he was. If you have some authorities on it, bring them tomorrow and I will consider them. I will adjourn the case to study that, if it is that important.

Mr. Ennis: We will be quite content if Mr. Baum will agree to have here tomorrow morning, or whenever Your Honor returns, any statements by the witness which he has and, at that time, if we feel we have authority, to urge Your Honor to allow us to see them before he is examined.

The Court: Here is what I would like to have the authorities on, you don't need to waste any time on his right to look at them before he answers, because I know that as well as I know any rule. The only proposition that I do have in mind is his right to examine or your right to examine him or confer with him while he is on cross-examination. I never heard of that before; it might have been done, though.

Mr. Ennis: We will be quite content if Mr. Baum will [4089] produce what statements he has.

The Court: All right. Be here at ten in the morning.

(Thereupon, at 12:00 o'clock noon, an adjournment was taken until the following day, April 1, 1955, at 10:00 o'clock a. m.)

* * * * *

April 1, 1955

[4092] Morning Session

Thereupon, Sigismund von Bibra the witness on the stand at the time of adjournment on Thursday, March 31st, resumed the witness stand, and testified further through the interpreter as follows:

Cross Examination by Mr. Baum (Resumed):

Q. Mr. von Bibra, you testified yesterday that you were assigned to Prague, Czechoslovakia as a member of the German Foreign Service from 1931 to 1936, is that correct? A. Yes.

Q. And while you were in Prague from 1933 to '36, did you also hold any position in the Nazi Party of Germany? A. In Prague?

Q. Yes. What was that Mr. von Bibra? A. In Prague, the Party was prohibited and I was only in charge of the members of the Legation and the Consulate.

Q. Did you have any formal title in that position, Mr. von Bibra? A. Local Party Leader and District Leader.

Q. And did you also become Chief Operations Leader in Prague? A. No.

Q. While you were in Prague, were you in charge of an [4093] intelligence service for the German Government in the Legation?

> Mr. Ennis: I object, your Honor, on the ground that the witness' duties for the German Government are completely remote from the issues in this case. I can't see what bearing it has on his direct examination or anything else.
>
> The Court: It might have some possible bearing on his motive to testify one way or another. I will accept it and you can argue later.
>
> (The Reporter read the previous question.)
>
> The Witness: No, except for the normal diplomatic service.

By Mr. Baum:

Q. Did you ever hear of a person by the name of von Wolmar? A. Not at the moment, but maybe he can help me refresh my recollection.

Q. Was not Mr. von Wolmar your assistant in Prague in this intelligence service? A. I had no intelligence service.

Q. Did a Mr. von Wolmar work for you in Prague? A. At the moment I cannot remember the name.

Q. Now, in 1936, Mr. von Bibra, you were assigned to the German Legation in Berne, Switzerland, were you not and I believe you also testified that you were the highest Nazi [4094] official in Switzerland, is that correct? A. Yes.

Q. And your title was Group Leader for the country of Switzerland, was it not? A. Not at first because it was not possible in Switzerland; it was prohibited and so I had the title of Representative of the Reich Germans in Switzerland. When Berlin found that was insufficient and made difficulties, I received the proper title about 1940, but that was all openly discussed with the Swiss Government.

Q. Mr. von Bibra, I show you this document and ask if you can tell me what it is? A. This is a copy of my application for the visa.

Q. And did you not state in that application for a visa, Mr. von Bibra, that you were Group Leader for the country of Switzerland from 1936 to 1943? A. Yes, because it was so in fact and because the other title meant the same thing. I should also have put into this application everything that I was at Prague but this was merely a formality and thus I put in the highest title.

Q. Mr. von Bibra, what were your functions as Group Leader of the Nazi Party in Switzerland? A. It was a very difficult situation because the previous country Group Leader had been murdered. Therefore, the Party demanded his replacement by a pure Party man, but the Foreign [4095] Minister, Neurath, refused and, therefore, there ensued a long discussion because the Party demanded that a pure Party man was to be appointed to the Legation cloaked as a diplomat. Later Ribbentrop did it. In Prague, I was to go with the famous Democrat Koch and there were 3½ million Germans. Not everything went smoothly but fairly well. We could not prevent the worse things from happening and thus I was a compromise to make the attempt at Berne and the most stupid thing I did was I accepted.

Mr. Baum: If your Honor please, I would like to move to strike that entire answer and repeat my question.

The Court: Repeat your question; I haven't got time to go over the whole answer.

Mr. Baum: All right. Mr. von Bibra, what were your functions in Berne as Country Group Leader.

The Witness: To direct the organization of the Party to be responsible for the Reich Germans. This had previously, that is previous to 1933, been the functions of the Missions and Consulates and the Party attempted to take this jurisdiction away from us and in the first years, there was a constant fight between the Diplomatic Missions and the Party and I thought it would be possible to do the thing if one united these functions in one person.

By Mr. Baum:

Q. Your functions as Country Group Leader were separate [4096] from your functions as Counselor of the Legation, were they not? A. Yes, but they came upon my desk at the same time and I processed them at the same time and transmitted them to the Legation. My subordinates handled the Party matters just the same as they handled the nonParty matters.

Q. And your position as Country Group Leader was part of the foreign organization of the Nazi Party, was it not? A. Yes.

Q. Now, in 1943, Mr. von Bibra, I believe you testified you went to Madrid? A. Yes.

Q. What was your title in the Legation or Embassy in Madrid? A. Minister.

Q. Were you ever appointed Minister to Portugal? A. No. Officially I don't know, but I know unofficially and I heard that one had the idea to send me there.

Baron Sigismund von Bibra—for Plaintiff-Intervener —Cross

Q. Did you have any connection in Berne or in Madrid with the Gestapo? A. In Berne, the man from the Gestapo was sent to the Consulate at Luzern in 1942 and when I arrived at Madrid there was a Police Attache in the Embassy with a staff of some 20 persons.

Q. Did you engage in any activities on behalf of the [4097] Gestapo? A. If you call the trouble I had with the gentlemen, if you call that activity, the answer is yes.

Q. At the present time, Mr. von Bibra, you are still a member of the Foreign Service, are you not? A. I have the status of an official waiting for further assignment but I do not believe that I have a chance.

Q. Do you receive any compensation from the German Foreign Office today? A. Not from the Foreign Office but from a fund under Section 130. I am a person in the category of 130.

Q. Is that something like a retirement pension? A. It is called expectancy retirement. I could not make up my mind to be retired on a pension.

Q. While you were in Berne, Mr. von Bibra, did you ever hear of a person by the name of von Nostitz? A. There were two by that name. One was the Chief of the Consular Department at Berne and the other was Consul at Geneva.

Q. Mr. von Bibra, I would like to show you a document and ask you to tell me whether you recognize that document? A. Unless he shows me the wire to which reference is made in this document, it is impossible for me. The von Nostitz mentioned here is the one in the Legation.

Q. Mr. von Bibra, I'm not yet interested in the contents [4098] of this document. I would like to ask you if you recognize it as a memorandum prepared by you? A. From the office—the name of von Nostitz is written there and the notations, "For information," and "To the files," that means that nothing further is to be done are in my handwriting.

Q. In other words, Mr. von Bibra, is it correct you prepared this memorandum and said, "Send it to file after Mr. von Nostitz has seen it?" A. Yes, as far as I can see, yes.

Q. Now, Mr. von Bibra, I would like to show you a document and ask you whether you recognize it as the document referred to in the first memorandum that you have just identified? A. Yes, may I read it?

Q. Go right ahead.

(Defendant's Exhibits No. 155, 155-A, and 156, 156-A, were marked for identification.)

Mr. Baum: If your Honor please, I would like to offer the first document, which the witness identified and the English translation thereof as Defendant's Exhibit 155 and 155-A, respectively and the telegram, which the witness has said is the one referred to in the first document as Defendant's Exhibit 156 and 156-A.

Mr. Ennis: I object to these documents, Your Honor, the first one on the ground, as I understood it, the witness identified some marginal handwriting as his but I do not believe [4099] that the authenticity of the document has been proved by that testimony.

The Court: I thought I understood him to say that after he read it over with the person whose name is mentioned, he ordered it filed, didn't he?

Mr. Baum: If your Honor please, after he identified these notations as his writing, I asked him the direct question, in other words, if he prepared it and if I remember his exact words, "So far as I remember, yes."

The Court: Then you also asked him after he read it over?

Mr. Baum: That is right.

The Court: He said that it should be put in the files.

Mr. Baum: This is the memorandum of a conversation with Mr. Fritz von Opel.

The Court: I'm not going to strain over items of rules of evidence on these points unless they are clearly inadmissible. I will take exception to your objection. On any of these items, when you come to some which you think are inadmissible, you can call it to my attention and I will take it under advisement if anything is clearly inadmissible. Since we don't have a jury, I'm taking a good deal of it here subject to your argument a little later on.

Mr. Ennis: I understand that, your Honor; my only trouble with this particular item is that it apparently is a [4100] document from some German Government authority, but I did not understand the witness had identified anything more than some marginal notes which he said were in his handwriting. I didn't understand him to testify that he had prepared the document and I want to make it clear that is my objection.

The Court: Let's find out what he said.

Mr. Ennis: I'm informed by Dr. Kronstein that the translation did not make it clear this witness was asked whether he prepared this memorandum, your

Honor, and I think it an important point and I would like to have it clarified.

The Court: Well, I will tell you, ask him right now and then I will read the record a little later on. Ask him right now if the notes were prepared under his direction with his knowledge.

Mr. Baum: Mr. von Bibra, this memorandum which is marked Defendant's Exhibit 155, was that prepared by you?

The Witness: Dictated.

Mr. Baum: I renew my offer, your Honor, it is not signed.

The Court: If it is dictated by him, I suppose it is admissible. It is received.

(Defendant's Exhibits Nos. 155 and 155-A were received in evidence.)

Mr. Ennis: Have you offered the second one, Mr. Baum?

[4101] Mr. Baum: Yes.

Mr. Ennis: On your second one, I object to the second document which purports to be a secret telegram on the ground that there has been no evidence that the witness prepared this document and there is no authentication of this document at all as a correct copy of the alleged telegram.

The Court: Let me read this.

(Thereupon, The Court read the document in question.)

The Court: As I understood him, Mr. Ennis, and I'm trying to follow this as best as I could, the witness identified this Defendant's Exhibit No. 156 as the telegram to which he had reference and what he now says he dictated by way of a memorandum in 155. As I recall, he asked to see that before he really identified 155. I think it is proper.

Mr. Ennis: Well, that is just your Honor's recollection of his testimony differs from mine. I thought that all that was done, this telegram was identified by number.

The Court: I will tell you what you can do. This is being written up and you can check on it if you want to in the course of argument and if I'm mistaken, I will reconsider I thought he did say that. Is that your recollection, Mr. Bauer?

Mr. Baum: Yes, your Honor. My question was, I believe, "Is this the telegram referred to in the first exhibit?" He said, "Yes."

The Court: All right.

[4102] (Defendant's Exhibits Nos. 156 and 156-A were received in evidence.)

By Mr. Baum:

Q. Mr. von Bibra, I believe you testified that in the year 1946, you returned to Germany from Spain, is that correct? A. Yes.

Q. Did you not return to Germany at the request of the Spanish authorities? A. I do not like to answer this question because the Spanish were very nice to me. I would not like to make any trouble for them at this late date. I left voluntarily against the wishes of the Spanish. Of course, there were others who had the wish that I leave.

Q. When you returned to Germany, I believe you said you were interned by the American authorities for approximately two years, is that correct? A. Yes.

Q. In the course of your internment at one point you were brought to Nurenberg, were you not? A. Yes.

Q. And do you recollect being interviewed by Mr. Joseph Laufer, Department of Justice, while in Nurenberg? A. I don't remember the gentleman's name.

Q. Do you remember the interview, however? A. Concerning this question?

[4103] Q. Concerning this case. A. Yes.

Q. And do you remember whether or not you prepared a statement of the facts you knew at that time? A. I believe yes.

Q: I show you a document and ask you if that is the original of your statement? A. Yes.

Q. Would you please read it, Mr. von Bibra, so that I may question you about it?

(Thereupon, the witness read the document referred to.)

By Mr. Baum:

Q. Mr. von Bibra, is there any reference in that statement to the exchange of letters which you had with Mr. von Opel in 1939 being the documents identified as Intervenor's Exhibit 6 and 7, which you had in your hand yesterday? A. No.

Q. Did you know about these letters when you made this statement? A. I had completely forgotten about the correspondence. I saw it in the original only yesterday but I may perhaps add that in the meantime, it has occurred to me that yesterday I also omitted an error. I did not first meet Mr. von Opel when he came to the Legation, but approximately four weeks earlier at an automobile race for the Grand Prize of Switzerland. [4104] On that occasion, Mr. von Stuck was present and Mr. von Stuck introduced me to him and Opel had a broken foot and I drove him to Berne in my car and about four or five weeks later, he came to the Legation with his wife.

Q. Coming back again to this statement, Mr. von Bibra, did you not say therein, near the bottom of the second paragraph, "I knew that he," referring to Fritz von Opel "tried to become naturalized in Liechtenstein, I believe." A. I didn't understand.

(Thereupon, the Reporter read the pending question.)

By Mr. Baum:

Q. The question is, Mr. von Bibra, did you say that? A. What is in here I said.

Q. And you were questioned by Mr. Laufer concerning Mr. von Opel's change of citizenship, were you not? A. Yes.

Q. Now, look at the sentence immediately following the one I have just referred to, Mr. von Bibra, which reads: "I can assert positively that he," again referring to Fritz von Opel "did not try to get his nationality confirmed by the Government."

What was the basis for the statement, Mr. von Bibra? A. I think I can remember that this was the most important topic in the questioning at that time. There is or there was a secret instruction according to which a German [4105] could take on a new nationality and, at the same time, retain the German nationality. This, however, required special permission of the Chancellor of the Reich. These were rare cases and this would have involved a big action which we did not undertake for von Opel. We didn't do this once in Switzerland.

Q. Was it not a fact, Mr. von Bibra, and did you not know that a German citizen could retain his citizenship under the regular citizenship law of Germany? A. No, he could not.

Q. Is it not a fact, Mr. von Bibra, and did you not know that a German who was acquiring foreign nationality could apply for permission to retain his German nationality merely by filing an application with the officials of the particular province from which he came? A. I have been away from these matters for ten years and whenever a question like that arose, we consulted with experts but, in my recollection, that was not possible. That it should have been possible that a Prussian or a Bavarian should have obtained this permission from Prussia or Bavaria, and how was it, after 1936, when there was no longer a Prussia or Bavaria?

Q. Now, Mr. von Bibra, please turn to the fourth paragraph of your statement, the first sentence which reads: "At the time I met them, the Opels had exposed themselves as [4106] opponents of national socialism to such an extent that they could not have possibly returned to Germany." What was the basis for that statement? A. This was what I was convinced of.

Q. Did you know that Mr. and Mrs. von Opel had just returned from Germany in August of 1939? A. No.

Q. In your capacity in the Legation in Berne, did Mr. and Mrs. von Opel tell you that they had been to Germany every year? A. This I cannot say under oath; I don't remember.

Q. Well, you have testified that you visited the von Opels at this house on several occasions and they visited your house. Did you never discuss their trips to Germany? A. I always imagined that they could not return to Germany, that something had happened there.

Q. Now, Mr. von Bibra, do you remember being interviewed by Mr. Charig, sitting right here, at your home in Germany in June of last year? A. Yes.

Q. Do you remember whether or not Mr. Charig showed you a copy of this statement which you have just been examining? A. Yes.

Q. Do you remember what Mr. Charig said to you about this statement? [4107] A. According to what I now know, what is written here is complete nonsense. In Nurenberg, I was questioned with reference to the brother-in-law of Mr. von Opel, Mr. Sachs, and he was even richer and that was such a difficult and troublesome questioning that I got confused.

Q. Is it not true, Mr. von Bibra, that Mr. Charig showed you a copy of that statement in June of last year and asked you whether or not you could elaborate on it? A. Yes.

Q. Did you? A. I don't think that much came out of it.

Q. Did Mr. Charig question you about Mr. Fritz von Opel's neutral citizenship? A. I think, yes.

Q. Did you tell Mr. Charig anything about this exchange of letters in 1939 in Berne with Mr. Fritz von Opel, the documents identified as Exhibits 6 and 7? A. No.

Q. Is it not a fact, Mr. von Bibra, that you told Mr. Charig in June of last year that you only had a vague recollection of Fritz' change of citizenship? A. Yes.

Q. Did Mr. Charig, as far as you remember, ask you anything about Mr. von Opel's property interests in the

United States? [4108] A. It is very difficult for me to tell what somebody told me. In my first imprisonment, the man who opened the door of my cell was Mr. Kaul and Mr. Kaul told me so much about the Opels and their affairs, that it is very difficult for me to tell what he told me or what somebody else told me.

Q. I will try and simplify the matter for you, Mr. von Bibra. In June of last year, did you tell Mr. Charig at your home that you knew the von Opel family had some property in the United States but you did not know the details about it? A. Real details I don't know even now. The thing I was supposed to read the night before last, I was too tired from the trip. There was something in the statement about it.

Q. Now, in August of 1954, Mr. von Bibra, do you remember being interviewed by Mr. Charig and myself? A. Yes.

Q. And during the course of that interview, did I not ask questions which Mr. Charig translated into German for you to answer? A. Yes.

Q. Did either Mr. Charig or myself ask you in August of last year about Mr. von Opel's citizenship? A. I think you did.

Q. Do you remember specifically my asking you whether you delayed the report that Fritz von Opel had acquired Liechtenstein citizenship, delayed sending it to Berlin? [4109] A. Yes.

Q. Is it not true, Mr. von Bibra, you told Mr. Charig and myself that you could not remember having done any special favor or anything unusual for Fritz von Opel in that respect? A. Did I say that?

Q. I will ask you, Mr. von Bibra? A. That I did as much as this, I did not remember. I did not remember.

Q. What do you mean when you say, "I did as much as this"? A. The letters; the entire matter.

> Mr. Baum: May the record show, your Honor, that the witness is referring to Intervenor's Exhibits 6 and 7.
>
> No further questions.

Redirect Examination by Mr. Ennis:

Q. Mr. von Bibra, did I understand you to testify on cross examination that Foreign Minister von Neurath arranged for you to obtain a position as head of the Nazi Party in Switzerland? A. Yes, it is not quite precise because it was the compromise between von Neurath and the Party.

Q. Didn't you testify that the Foreign Minister wanted a Diplomatic Officer to hold that position? A. Yes.

Q. And is that why you received the position? [4110] A. The question, which was very complicated at the time, is very difficult to simplify now but, if you simplify it, that is the way it was.

Q. Now you explained yesterday, Mr. von Bibra, that in your deNazification proceeding, you received the lowest classification, your case was dismissed. Is that correct? A. Yes.

Q. Now, just so his Honor understands, will you state how many classes there were? A. There were five.

Q. And the first class was the most important cases, is that correct?

> Mr. Baum: If your Honor please, I think this is not only improper and immaterial but he testified he

was dismissed. It is like a murder case, you can be found guilty of first degree, second degree, manslaughter, and so on. It is the same idea. He was acquitted.

The Court: Well, let him explain it.

Mr. Ennis: I would like to say for the record that it is not at all like a murder case in my opinion.

The Witness: Yes.

By Mr. Ennis:

Q. And you were placed in the fifth class? A. Yes.

Q. Now, you were asked questions by Mr. Baum whether [4111] Mr. Fritz von Opel had forced you to come to the United States to testify in this case?

Mr. Baum: I object to the form of that question. I merely asked him whether he told the Consul that.

Mr. Ennis: That was not my recollection. To avoid any difficulty, I will withdraw that question and ask another question.

Will you tell his Honor any conversation you had with Fritz von Opel about your coming to testify in this case?

The Witness: His attorney inquired from Wiesbaden whether I would be willing to come here as a witness because his attornies here demanded my presence here. I was very little pleased with it, happy as I was to think that I would have an opportunity to get to the United States but I thought that this will cause me so much trouble that I did not want to come and thus I was torn back and forth and finally I thought it would not be decent of me not to come until the minute I boarded the plane.

I had had enough of this stuff: two years' imprisonment; two years of deNazification proceedings and now to start all over again with this stuff, in the meantime without a penny of money and then start life all over again.

This is a decision which I, alone, had to make. Of course, I could have reported myself sick but the truth is that I was not anxious to come. This is what I told the Consul.

[4112] *By Mr. Ennis*:

Q. Now, Mr. von Bibra, I would like you to look at your letter to Mr. Fritz von Opel, which is Intervener's Exhibit 7 in evidence, and I would like you to direct your attention particularly to the third paragraph and the second part of the third sentence which reads:

> "that since moreover you have reported here immediately after the outbreak of the war and have offered your services for any activity of whatever kind"—I understood you to testify yesterday that the help that rich Germans in Switzerland could give was money. Did you testify to that effect?

Mr. Baum: If your Honor please, I strictly object to that as improper redirect examination. This man on cross examination was not asked one single question about this part of that letter. It is an attempt to rehabilitate a bad answer from the witness on direct examination and I don't think it is proper.

The Court: Is it responsive to anything?

Mr. Ennis: I'm going to ask him, your Honor, what help Fritz von Opel gave as far as he knows by money or otherwise. I did not ask him that yesterday.

The Court: Is it redirect or is it direct that you overlooked? I just don't know as I don't remember. I'm like Mr. Baum, I didn't remember that testimony.

[4113] Mr. Ennis: I think Mr. Baum's and my recollection is the same. I asked him the question and he said that the kind of help rich Germans could give was giving money and I want to ask him what money Fritz gave, if any?

The Court: You can ask him that; go ahead.

Mr. Ennis: Why don't I do it directly. Mr. von Bibra, what money did Mr. Fritz von Opel give to the Nazi Party or to Germany, so far as you know?

The Witness: According to what I know, he gave nothing to the Party and nothing to Germany either. I once asked him with regard to a rowing club whose president had come to me and told me that they needed a lot of money. I did not realize how much it was. I thought it might be 10,000 francs or so and so I asked Fritz von Opel to help him. I thought of him as a sportsman and I only thought of him as a sportsman, so I asked him if he couldn't help these people. According to what I saw in the files the other night, the amount involved was 900 francs.

By Mr. Ennis:

Q. Is that help to the German Sport Club in Zurich the only money that you know of that Fritz von Opel gave to any German organization? A. Yes.

Q. Did any German in Switzerland complain to you that Fritz von Opel did not patronize Germans in Switzerland?

[4114] Mr. Baum: I object to that, your Honor, as hearsay and immaterial.

The Court: I must sustain that.

Mr. Ennis: It is not hearsay.

The Court: That is what somebody told him. It wouldn't establish the fact.

Mr. Ennis: Perhaps I can go at it in another way. In your official position as Councillor to the Legation in Berne, did anyone complain to you about the conduct of Fritz von Opel in Switzerland?

Mr. Baum: If your Honor please, even though this man may have heard the statement personally, I fail to see how it is material or competent to prove that somebody else complained of Fritz von Opel.

The Court: I don't believe it is, but let the answer go; it may develop something.

The Witness: In such a case, people did not come to the Councillor of the Legation but to the Chief of the Party. Because I visited at the Opel house, the local man told me it was a disgrace that I visited their home. This was a very sad case; the man had a large shop and the Opel's had declined to buy in his store.

By Mr. Ennis:

Q. He was a German, was he not? A. He was the Chief of the Party in St. Moritz. It [4115] was laughable.

Q. Did you report Fritz von Opel's change of citizenship from German to Liechtenstein citizenship to the German authorities in Berlin? A. No.

Q. When you testified yesterday, did you remember that you had met Fritz at this automobile race? A. No.

Q. What recalled it to your mind? A. Mrs. von Opel.

Q. After your testimony yesterday? A. Yes; she is right. It is true.

Mr. Ennis: I would like to offer in evidence, Plaintiff Intervenor's Exhibit No. 19, the statement of the witness on October 2, 1947 at Nurenberg concerning which he was cross-examined by Mr. Baum.

Mr. Baum: I don't think, your Honor, that my cross-examination of a witness to show that he did not fully reveal the facts makes this statement admissible on behalf of the party offering it.

The Court: I don't think it is admissible on any rule of evidence except to contradict him. If you don't offer it to contradict him, it is not admissible.

Mr. Ennis: I don't want to offer it to contradict him, your Honor.

[4116] The Court: I know you don't.

Mr. Ennis: I can go through this statement and ask him the questions, did he say this and did he say that on the parts I want to bring out. Now, I can do it that way if your Honor wishes or if Mr. Baum insists. I think it has been established that he made this statement and I would like to offer it for all purposes.

The Court: What he said isn't admissible unless he contradicts him. Of course, the ultimate fact would be, if you want to ask him the facts.

Mr. Ennis: Yes, I wanted to shorten it up, your Honor. I will ask him one or two items.

The Court: It is all right.

By Mr. Ennis:

Q. Did Fritz von Opel tell you that he was opposed to national socialism? A. Yes.

Q. Did Fritz von Opel receive any assignment, either officially or unofficially from the German Legation at Berne while he was in Switzerland? A. No, he did not. May I add something? The matter that came up a little while ago with the diplomatic telegram, that is the sort of thing we did in all cases, just as I did it in the Opel case; a routine matter.

Q. Well, I show you the telegram to which you refer, [4117] Defendant's Exhibit 156A, the German text, that is dated September 1, 1939, the day the war commenced in Europe, is it not? A. There is no year on it.

Q. Well, I note from the copy, Mr. von Bibra, there is no year on it but from your knowledge of the subject matter, is it your opinion this was sent from Berlin to the Legation at the beginning of the war; is that your opinion or not? A. We can see the date from the reply. The date would be revealed in the reply.

Q. All right, thank you. What did you mean when you said it was a routine matter—this subject? A. This kind of telegram was sent by all governments during the war, French, British and so on, and they made trouble to all diplomats. At that time, I was still talking to American colleagues and we both were not happy over this sort of telegram. My conversation with Mr. von Opel I reported to the files but not to Berlin. It is signed by my hand to the files.

Q. By your last statement, you refer to Defendant's Exhibit 155-A, the German text, is that correct? A. Yes.

Q. Did you know Dr. Wehrli mentioned in Defendant's Exhibit 155? A. I think I did.

Q. Looking at Defendant's 155, do you have any independent [4118] present recollection of any conversation with Fritz von Opel on such a subject? A. No.

Q. By the way, one further subject, do you recall any telephone conversation with Mr. von Opel shortly before he left Switzerland for the United States in April of 1940? A. I do not remember anything. Mr. Kaul told me about it during my internment in 1946.

Q. But you recall nothing about such a conversation? A. No, but words with Kaul reproduced to me—I cannot imagine that I should have said these words.

Q. Well, we don't want Mr. Kaul's testimony. Thank you very much. I have no further questions.

Mr. Baum: I have just one or two, your Honor.

Recross Examination by Mr. Baum:

Q. Mr. von Bibra, you said a short time ago, Mr. von Opel gave 900 Swiss francs to the Rowing Club in Zurich, is that correct? A. Yes.

Q. Mr. von Bibra, when for the first time, did you remember that it was 900 francs that Fritz gave to the German Rowing Club? A. I didn't remember at all. I read it the other day.

Q. Where? [4119] A. I glanced over the testimony that was given two weeks ago here.

Mr. Baum: No further questions.

Mr. Ennis: No further questions. If your Honor please, I have one exhibit, that on the deposition of Mr. Schattmann. I would like to have this marked Exhibit No. 1. I didn't have it at the time as I had misplaced it, but I offer it now.

(Plaintiff Intervener's Exhibit No. 1 was marked for identification.)

Mr. Ennis: You will recall, Mr. Baum, Mr. Schattmann's affidavit with a letter from Mr. von Opel annexed; do you remember?

Mr. Baum: Your Honor, I recall and I have no objection. I am merely trying to avoid some confusion. Mr. Ennis does have an Exhibit No. 1 in evidence and an Exhibit No. 2. I think you have forgotten to leave a number for it.

Your Honor, I think we need not take your Honor's time. I think we can agree on this ourselves and fix it up.

Mr. Ennis: All right, your Honor.

The Court: Does that complete the testimony?

Mr. Baum: Yes, your Honor.

Mr. Ennis: It does.

The Court: Have you gentlemen anything else, any arguments? I don't want to hold you down but I want to get an [4120] estimate of how much time it will take.

Mr. Ennis: Your Honor, I don't see any reason to argue the case on my side for more than an hour.

Mr. Baum: As far as I'm concerned, your Honor, I won't promise an hour; it might run closer to two.

The Court: All right. Do you want to start now or start after lunch?

Mr. Ennis: I would much rather do it immediately after lunch, if that is agreeable.

The Court: All right. I won't disturb you. I think it might be helpful to me to let you argue as much as you want.

The witness is excused.

(Witness withdraws from the stand.)

Mr. Ennis: I offer as Plaintiff Intervener's Exhibit No. 1 in evidence the affidavit of Erwin Schattmann, sworn to on March 2, 1942 and two letters attached.

Mr. Baum: No objection.

The Court: It is received in evidence.

(Plaintiff Intervener's Exhibit No. 1 was received in evidence.)

The Court: We will recess until two o'clock.

(Thereupon, at 12:05 p.m., the Court was adjourned to reconvene at 2:00 o'clock p.m., the same day and place.)

[4121] (2:20 p.m.)

AFTERNOON SESSION

The Court: You may proceed, Mr. Ennis.

ORAL ARGUMENT OF EDWARD J. ENNIS

Mr. Ennis: If the Court please, the evidence is taken at great range, which is to be expected where you have to resolve a question that, so far as I know, is without any precedents as to what facts will constitute enemy taint of an individual as distinguished from a corporation where you have the ordinary tests of amount of ownership and nature of control.

Before going into the facts, I would like to make, as my first point, your Honor, a point which I think is quite fundamental in the case; if we are going to be of any assistance today we might as well go right to the heart of the case, as each counsel sees it.

The point that I think is fundamental is whether the rights of Fritz von Opel as legal owner of the vested property or of the plaintiff shares, the plaintiff then owning the vested property—the fundamental question is whether those rights are going to be determined by the German law under which the rights of his parents were initially determined by this Court, or whether his rights or lack of rights are to be determined not as a matter of German law in the first instance, but on the basis of certain statements not in your Honor's findings, not in your Honor's opinion, but in the [4122] Court of Appeals opinion, and in the opinion of the Supreme Court of the United States.

I am not talking now about whether your Honor is going to let Fritz von Opel recover anything. It may very well be that your Honor will decide as a matter of American law that he is not entitled to recover anything, but it is fundamental to my case that we obtain, if we can from your Honor, a finding under the evidence on German law as to what the rights of Fritz von Opel are in the property.

That is fundamental to our case, your Honor, because if we disagree, or if your Honor, in your own judgment, differs with us on the American law, we have in a new case like this our legal remedies.

However, if we do not obtain from your Honor a determination of fact, a finding of fact by your Honor as to what his rights are under German law, we are in great difficulty indeed.

Oral Argument of Edward J. Ennis

On the basis of Dr. Kronstein's testimony and Dr. Schoch's testimony, I have submitted to your Honor our proposed findings 21 to 30, which are the rights of the legal owner and the usufructuary in property subject to a usufruct under German law.

Your Honor will recall that you heard a great deal of testimony in the first trial. That testimony was quite naturally and properly addressed to the extent of the rights of the [4123] usufruct under German law, because the issue before your Honor, which the Government pressed on you, was that if the usufructuary's rights under German law were enough in the plaintiff's whole shares, then the plaintiff was tainted, and Your Honor very carefully made your Finding No. 52.

When you set out under German law that these are the rights of a usufructuary, your Honor did not set out that under the German Civil Code in the testimony the following are the rights of the legal owner of the property subject to a usufruct, because it was not in issue at that time.

But your Honor relied very heavily on German law not only in setting out the rights of a usufructuary, but it was only the German law which gave the Opel parents an in rem right in the property, in the plaintiff's shares which you take in the vested property.

Your Honor will recall that the experts agreed that the gift agreement itself did not give the parents any rights in rem in the plaintiff's shares or in the proceeds of the gift. The Government pressed on your Honor, and your Honor, I think, found it necessary to find that that in rem right was set up by the delivery of the key to the parents' agent Frankenberg.

It was, therefore, my point is, necessary to rely strongly and definitely upon the German law to establish the usufructuary's right, which justified the holding of the property as enemy property and which prohibited giving it back to the [4124] plaintiff corporation as an appropriate claim.

But what do we find when we come back to your Honor, and say now the legal owner of the property has intervened? You have found the rights of a usufructuary under German law. Under Your Honor's finding German law, rather than Swiss law, should apply to the owner's rights. We bring the German law on the subject through our experts. Does the Government present to your Honor any expert testimony as to what the rights of a legal owner are in property subject to usufruct? Not at all, your Honor.

There is not one word of testimony. There is not one finding presented by the Government or suggested by the Government as to what the rights of the legal owner of the property are under German law. What is the reason for that?

It is as clear as the German law, which is, of course, that a legal owner has all the rights in the property which the usufructuary does not have. And the inevitable consequence of such a finding under German law is that subject to his mother's rights—and the Government stands in the position of Mrs. von Opel, Fritz's mother—subject to her rights, he is the owner of the property.

How does the Government choose to deal with that? Not by evidence. Miss Schoch said not one word as to what the rights of a legal owner in property subject to a usufruct was, and Mr. Baum was very careful not to examine her on that [4125] subject.

In cross-examination she agreed with me that if the legal owner, if there is a usufruct, under the German Civil Code, he gets the property when the usufructary dies.

Her testimony was restricted to another subject entirely; namely, the famous hypothetical question that if the usufructuary has not a usufruct under German law but that usufruct becomes something else, a right to dispose of the property—and it was brought out in the testimony that this additional right of disposal was to dispose of the property for the usufructuaries of the properties, without any accounting to the legal owner—so the Government takes the position, we don't want any testimony on what the legal owner's rights are under German law; we want to stand on the ground that the Court has already decided that this is not a usufruct under German law, it is a great deal more.

Of course, it is a little ironical, because at the first trial, the Government had to rely very strongly on the German Civil Code in order to get that right in rem because if it didn't establish the right in rem in the property under German law, these enemy parents would have merely had a contract claim against their son, and the Government vis-a-vis the son would not be entitled to retain the property.

They relied heavily on that point. Now, however, they want to depart from the German law, and what do they substitute [4126] for the German law? There is nothing in your findings to help them, because they are restricted to the usufruct, but they do have something, and that is comment in the Court of Appeals opinion and a comment in the Supreme Court opinion.

What did the Court of Appeals say? It affirmed your Honor and said, certainly this is a case of taint of the Swiss corporation, that the enemy interest in those shares is sufficient, and I do not have the first opinion of the Court in front of me, but they used the phrase that the Opel parents were beneficial owners of this property.

The Court of Appeals in its short opinion, Your Honor—the two opinions, altogether, I think, three pages—said nothing which indicates that the Court of Appeals is disagreeing with your findings of fact on German law; that the Court of Appeals is deliberately going beyond your findings and saying we don't agree that under German law a usufructuary's rights are only the rights set out in Finding 52. We find something entirely different.

We find that this isn't a usufruct under German law. It is something under American law. It is complete beneficial ownership with a mere dry legal title in the legal owner. There is nothing like that. But there is general language in there which lends some support, if it were based on anything in the record, for the Government's contention that you are not dealing any longer with a usufruct under German law.

[4127] You are dealing with some form of complete ownership under American law. In the Supreme Court opinion, there is some other language which also lends support to this legal contention. I do have that in front of me, and I will read it. It is very simple.

Mr. Justice Minton, in his opinion for the entire Court, in the statement of facts and what the case is about, is very careful to set out in full—he quotes in full your Finding 52 as to what the rights of a usufructuary are, and apparently expresses complete approval that these are the rights created under German law; but then the Supreme Court goes on in its legal exposition or argument on the American law involved in the case, and a couple of pages later in the opinion, Mr. Justice Minton says this:

> "It is clear that for practical purposes, to the extent of 95 percent, the property was largely owned, managed, used by Wilhelm."

Certainly that language taken in isolation isn't restricting itself to the legal rights of a usufructuary under German law. It is expounding the American law. He says "for practical purposes," this was Wilhelm von Opel's.

> "The findings demonstrate that petitioner was a corporate holding company acquired for the purpose of enabling Wilhelm to control and use his property as he saw fit."

[4128] It is true that that general statement is somewhat supportable. Your findings do show that parents and son agreed that when he was given the gift that he would set up a holding company and that the usufruct would be established in the shares of the company.

Your Honor found on that, and we do not now object to that; but we do object to taking general language like this and trying to add it to the findings and to say, "Ha, the Supreme Court has now said that the findings of foreign law, must be supplemented by this additional consideration, that the parents had everything, Fritz has nothing, so we won't put an expert on the stand and prove what a legal owner has under the German Civil Code, because we can't make a case. We will just put the expert on the stand, and we will have Miss Schoch answer this question: suppose that a usufructuary had everything else, including rights of disposal, isn't it true that the legal owner would have no valuable interest in the property?

We hardly had to come back here, your Honor, from the Supreme Court and retry this case in order to find out that if you assume the legal owner has nothing, no rights in the property, that, therefore, his lack of rights had no value, and that is what Miss Schoch's testimony is.

It is based solely on Mr. Baum's hypothetical question. His hypothetical question is based solely on general language [4129] in the opinion of the Supreme Court.

I continue this language:

> "His interest was paramount and controlling. The interest of Fritz was wholly and in reality subordinated to Wilhelm's."

That is true, but how is it wholly subordinated? It was subordinated in the sense that a legal owner's interest in property subject to a usufruct under German law is subordinated to the interest of the usufructuary.

Your Honor set out those standards: he has co-possession by virtue of that; he can prevent sale; he is entitled to enjoy his interest for the period of his life. That is how it is subordinated.

One could read that language to mean that Fritz von Opel had nothing. On the other hand, the Government can't establish the enemy interest by relying on German law, and then on the other hand ignore that law and then rely on general language in an appellate opinion to find that he had nothing.

There is one other place that the Government gets its foreign law, not from an expert but from Fritz von Opel's affidavit in the Gold Case.

Of course, the reason we are here at all, your Honor, is that these interests were set forth first in the Gold Case. In the Gold Case, there is an affidavit on foreign law by Mr. [4130] Wronker-Flatow. Does Mr. Wronker-Flato say that the legal owner has no rights under German law? Not at all.

That affidavit is in the record in the famous Exhibit 8 in the first trial. Mr. Wronker-Flatow's affidavit, sworn to on June 6, 1935, appears on Pages 1986 to 1990 of the printed record; and he very carefully sets out the provisions of the German Civil Code.

He quotes them; he says, these are the rights of a usufructuary: a right to co-possession; a right to prevent the securities from being sold; briefly the rights that your Honor found under German law.

But Mr. Baum in his reply to our brief makes no reference to that. He looks for the German law to Fritz von Opel's affidavit or looks for an injunction in the Gold Case.

Mr. von Opel had very able counsel, Mr. John W. Davis, and an affidavit was prepared by him, and he signed it, in which he said that his parents had a usufruct in this property under German law and that he had bare legal title.

Where did his lawyers get the phrase "bare legal title"? Very simply. They got it from the Justinian's Institutes, where the Roman institute is talked about as in any event the owner can have bare legal title.

Are we going to determine Fritz von Opel's rights in this property under German law by referring to an affidavit prepared for him by some American lawyers?

[4131] Are we going to find our foreign law that way when right in the same exhibit is an affidavit of a German lawyer who says nothing of the case?

Your Honor's experience is such that you of course can appreciate the weight to be given to an affidavit by a party to an action, that affidavit being prepared by his attorneys. In the Gold Case, it was held that gold owned by a plaintiff Swiss corporation was under the Treasury regulations. The owners contended that since the Swiss corporation was a foreign corporation, the gold regulations were not intended to apply to gold owned by foreigners, and there is some wording in the Treasury regulations which would support such an argument.

The very able attorneys for the Government came back and said, Well, it is a Swiss corporation, but the principal stockholder, Fritz von Opel, is right here in the United States so we can look through the corporate veil and find that we can reach the gold because he is the real owner; and then Fritz's lawyers say, yes, but there is this enemy interest on the part of his parents.

I say, your Honor, our judicial system will not support a conclusion that the foreign law is to be found either in general language of the appellate courts in this case or in an affidavit which a layman Fritz von Opel signed, prepared by his American attorneys.

[4132]The only thing else I am going to say about this—the cases are cited in my brief—the Supreme Court and this Court has universally recognized that foreign law is a question of fact. Foreign law is to be proved by expert witnesses like other things. The determination of the Court is to be made by findings of fact.

The Courts recognize that findings of fact on foreign law in one case may be different from the determination on foreign law on another case. I have cited to your Honor the two most famous cases on such questions. One is by the Court of Appeals in New York, and one is by the House of Lords, where they say that it is true that in a former trial we decided a question of foreign law one way, but this is another case.

In Mr. Justice Holmes' classic statement on a problem of this kind, he warns the court that where you are dealing with a foreign body of law, we must be careful not to impose upon the legal relationships created by that foreign body of law our own Anglo concepts of legal relationships, and that we must respect the expert testimony and that expert opinion that is given to the court and make our determination on those findings.

I am going to leave that first point, your Honor, with merely the statement that no matter how Your Honor rules on the questions of American law, that this case presents, I think [4133] some of them are questions of first impression. I would hope that your Honor will make findings as to what the interest in this property is of Fritz von Opel under the foreign law.

I have presented the findings based on Dr. Kronstein's testimony and a couple of questions on cross-examination to Dr. Schoch, in which she said, yes, if this is a usufruct under the German Civil Code, that is true; but it is quite different if it is Mr. Baum's hypothetical question.

I ask your Honor to find the findings that you think are proper as to what his interest is under German law unless if, after deciding what his interest is under German law, you decide other points under American law against him.

The second question, which I will now enter, and I am not going to discuss particular findings on German law—we have none from the Government, and I have tried to be general in setting out my proposed findings, those which I think are supported by the evidence.

I might, just at this time, your Honor, state, that it is possible that, although we have taken up a great deal of your time, you might find it helpful if, after you reach a decision in the case and advise us of the decision, as I suppose you will, I am sure we would be glad to come back and discuss the findings in relation to your Honor's decision.

We would try to make proposed findings which would conform [4134] to your Honor's decision, but we will leave that matter to your Honor's own discretion.

My second point is this: that we contend that the doctrine of enemy taint of an individual claiming through a tainted corporation, however difficult it may be to define that doctrine eventually, since there are no guides in the statutes or decisions, should not be applied to this case at all for the reason that your Honor should consider Fritz von Opel's interest as not being merely in the plaintiff's shares but as actually inhering in the vested property.

If we can persuade your Honor to accept that point, it is, of course, of great advantage to us; and it is quite fundamental for this reason: suppose there was no Uebersee Corporation at all, and let me give you two hypotheticals: one, property of Fritz von Opel seized by the Government in which his parents had no interest. It just happens to be correct that the Government does have some property of Fritz von Opel which was not in usufruct and in which there was no usufruct.

We have not tried to get that property back simply because the great bulk of the property is involved through Uebersee, and we are waiting until this case is disposed of.

But, your Honor, if the Government does not give that property back, you will agree with me that when Fritz von Opel goes in to get his own property and stands up before the [4135] court and says he never resided in Germany during the war,—and that under the Guessefeldt case, he represents such a situation which I do not find too difficult to resolve—he didn't reside in Germany, and he will say so, and he will say, "I want my patents back or my royalties, you got all of them."

There will be no question of taint. This whole question of taint only arises through the use of the corporation in which Fritz had an interest and the enemy had an interest. He is tainted only by reason of his association with this corporation.

I want to try, in this second point, to make this case exactly like that, and I do it in this way—and here I rely on the opinion of the Court of Appeals, its second opinion—in which the Court of Appeals said that the usufructuaries were not restricted to an in rem interest in the shares of the plaintiff; they say that the enemy usufructuary's interest inheres in the vested property, in the American assets.

The words are quite clear:

> "The interposition of this wholly owned holding company Uebersee did not destroy or disturb the usufruct in the proceeds of the 600 shares of Opel stock. The interposition was of form only and not of substance. The co-possession of shares of the holding company pursuant to the terms of the usufruct agreement was sufficient [4136] to prove that usufruct. Appellant . . ."

that is Uebersee—

> ". . . did establish what seems to us to be a purely formal separation between the ownership of the assets and the ownership of the shares of a wholly owned holding company. Whatever ownership the Swiss holding corporation had in those assets was subject to the usufruct agreement and co-possession of the shares of the holding corporation was sufficient to establish the requisite co-possession of those assets."

I say to your Honor very colloquially, what is sauce for the parents is sauce for the son.

If the Court of Appeals says that as a matter of American law, because it certainly isn't German law, if as a matter of business, trading with the enemy act, an enemy interest in the shares of a Swiss corporation will be construed by the court as an interest in the assets of that corporation, will be construed as an interest in the vested assets, then

I say, very well, whatever Fritz von Opel has in the corporation's shares, he then has, as a matter of the law of this case, in the vested assets.

What consequence flows from that? The consequence that I request your Honor to draw from that reasoning is that if Fritz von Opel's interest is directly in the vested property —let's forget about the doctrine of enemy taint. Let's forget [4137] about the Swiss corporation. He is then claiming exactly as if he were claiming his own property, his patents, and any royalties that may have accrued on them, and he only has to establish that he is not an enemy within the meaning of Section 2 of the Act, because taint only applies if the stockholder is claiming through a Swiss corporation.

In fairness to your Honor, I must add that the German law on the subject, uncontradicted, is that neither the owner of the property nor the usufructuary has any interest under German law in the assets of the corporation whose shares are subject to a usufruct.

The German law is that the corporate entity is recognized and respected. If parents and a son set up a usufruct in shares of a holding company, the usufruct is in the shares of the holding company, and the son owns the shares of the holding company, and neither one of them owns the assets of the holding company.

Dr. Kronstein testified, and I don't think it is questioned, that if it is desired to give the parents a usufruct in the assets of the corporation, it is very simple to do it: the corporation establishes co-possession of its assets with the usufructuary. But we do have a special situation here.

In fairness to the Court of Appeals I should say that they base their opinion on American law, not on German law; [4138] and it may be proper to base that on American public law where you are dealing with the power of our Government to seize and hold property. It may be proper for them to say as to enemy interest in the shares of a holding company, it is subject to taint, and we will treat it as a matter of American law as a matter of enemy taint in the vested property.

I am not objecting to that. I am just saying treat us equally. If they have an interest in the vested property, then we have an interest in the vested property; and we are not burdened with whatever doctrine may develop about a shareholder in a tainted corporation.

There is some support for the Court of Appeals' view, and the view of Your Honor, because the Court of Appeals properly points out that when the gift was made, the parties contemplated—and the testimony at the first trial was that the parties contemplated—that a usufruct would arise in the proceeds of the gift. That was contemplated that for the convenience of the parties the proceeds might very well be placed in a holding company, and the usufruct be created in rem by delivery into co-possession of the shares of the holding company.

But the Court said that since the parties contemplated that the usufruct would be established in the proceeds of the gift, it is fair now as a matter of American law, not on [4139] this point to be concerned with the German law, but to treat it directly as an interest in the vested property.

I will leave the point merely with the statement if your Honor accepts that proposition, I then say that we are not under the difficulty and the inhibition of claiming through a tainted corporation, trying to recover out of the corporate assets that part of our property which belongs to us as a shareholder.

Oral Argument of Edward J. Ennis

Your Honor will remember in the Kaufmann case, decided in the Supreme Court, the same day as this opinion, Justice Black said for the majority of the court Congress can't have intended that the interest of innocent shareholders in a corporation should be confiscated by the Government; let the innocent shareholder go in and prove his innocence and he is not part of the enemy shares and he will get his part of the corporate property back; and if he has no rights in the property directly, he has to establish this.

But I say in this special position, we have got a better position because if we apply the doctrine of the Court of Appeals, it can give us whatever right we have under German law, and you say as a matter of trading with the enemy act, Fritz von Opel has the same interest, then I say we make our claim free of the doctrine of enemy taint.

Now, I get to the third point, your Honor, which is Fritz must claim only through the corporation; what are the [4140] tests that a court is to apply in determining that an individual human being can be enemy tainted like a corporation?

My first point there, and I will pass it very briefly, is that we find no authority whatever in either the statute or in decided cases either in America or in England, for the proposition that an individual human being like a corporation can be enemy tainted.

The statute speaks of a corporation owned 50 percent or controlled by enemies as being an ineligible claimant. Your Honor cited that statute in holding that the plaintiff corporation was tainted.

Mr. Justice Douglas in the first opinion in the Supreme Court cited the same statute as indicating that the Congress had shown the way and he did adopt it, although in an unformed and incomplete way, this doctrine of enemy taint for an individual, and there is no support for that. There is not one iota of support for the proposition that an individual human being can be enemy tainted unless we say that it necessarily must follow from the Kaufmann case that if the Interhandel Swiss corporation is tainted and now Mr. Kaufmann, a stockholder of that company, can come in and claim his interest, that he has to somehow meet a test of enemy taint.

I say to your Honor that all Mr. Kaufmann has to meet is the test of a definition of enemy under Section 2 of this act, and if Mr. Kaufmann did not reside in Germany during the [4141] war and is not an enemy within the meaning of the statute, he gets back his share of the Interhandel property; but that is not an easy question for your Honor. It is a difficult one. That is our first point.

I will pass to our second point, and that is suppose your Honor finds as a case of first impression that, no, that is not satisfactory, a stockholder in a tainted corporation is going to have to meet some additional tests.

You draw somehow from Justice Black's opinion that he will have to meet some test of enemy taint, which your Honor will have to devise.

How can I help you, if at all, in devising that test? The easy test we have; the harder one we haven't. You can't say the corporation was owned 51 percent by his parents, and 48 percent by Fritz von Opel. It is not as easy as that.

You are going to have to look in two directions. You are going to have to look at the conduct of the individual stockholder in respect of the tainted corporation, or you are going to have to look in the direction of his conduct generally, what sort of a fellow is he, whose side was he on in the war.

I think for any judge in the absence of statutory authority for that approach it is going to be very difficult. Let's take the narrower ground first.

What did this stockholder do in respect to the corporation. [4142] I suppose Mr. Kaufmann would come into this court and say, all I know is I bought ten shares on the Exchange in Zurich and all this you talk about German ownership and operation, I don't know anything about. I am innocent by ignorance.

I suppose that will be the easiest approach for someone who buys stock on the exchange, but where that isn't the case as here what test shall we apply? What did he do about the corporation?

One thing we know Mr. Schattmann testified that all he did was take money out of the company and use it to build a new press to make parts for airplanes in 1941 when we were getting ready to fight the war. That is one positive thing he did with this company.

Is there anything on the other side he did? Is there anything that Fritz von Opel did as owner of this company that you can mark as hostile? You can say yes, he was sole stockholder, and somehow he did not fight with his enemy parents. What did his enemy parents ask him to do? He wasn't asked to give proxy on the stock to some enemy interest.

Just as Mr. Kaufmann will come in and say, I don't know anything about any German management or control in Zurich, I just have my stock, and I want to be part of the vested assets.

You will remember that Fritz von Opel was in the position of a donee. He had to take this gift the way it was given to [4143] him. We would hardly ask him to say to his parents in 1931—as a matter of fact, he did say it—I don't want this property subject to usufructuaries. But you would hardly ask him to say, Mother and Father, if you are going to make me this gift, don't make it as a usufructuary.

He is in the position of a man who accepted a gift with the condition they placed on it, and the condition they placed was that they wanted the usufruct.

They didn't want it badly enough or need it enough to use the dividends, but they wanted a usufruct. Can you find in that relationship something blameworthy on Fritz von Opel? Can you use the word "tainted"? Can you say Fritz von Opel is a tainted stockholder, not because he gave any proxies to a German stockholder, but because there was a usufruct held by his German parents?

Suppose a German father had given his son an apartment house in Washington, D. C., and said, "Son, it is all yours, but I am going to keep a German usufruct, and I am going to collect the rents and I am going to, as usufructuary, exercise control of the apartment house, control who the tenants are, and I am going to fill the house full of Nazis, all Nazis in the house."

And the son says, "Father, I don't agree with that, but if that is the terms I will take it on any grounds I can get it."

[4144] When the government seizes it and keeps it at least during the enemy father's life, are we going to confiscate the son's interest because he didn't reject the gift or go into court and ask a division of the property or attempt to assert the right to pick the tenants rather than his father?

Is that the kind of lack of conduct that is going to constitute enemy taint?

All of this, your Honor, I suppose merely suggests the difficulty of devising a test of enemy taint, if your Honor gets to that point.

We contend that there is nothing in his relationship to this property which warrants him being labeled as enemy tainted, and I will move to my last point.

The Court: I think we will take a short recess for about ten minutes at this time.

(Thereupon, there was a ten-minute recess.)

The Court: You may proceed, Mr. Ennis.

Mr. Ennis: Now, your Honor, I am indebted to Dr. Kronstein who said at Page 207 of the Interhandel record, your Honor made the comment that in the Uebersee case the corporate veil was ignored in dealing with the interests of the parties involved, and if that is your Honor's conception and analysis of this case, we, of course, feel that the corporate veil ought to be pierced for our benefit as well as for the Government's benefit in the position of usufructuary.

[4145] I will say no more about the conduct of Fritz with Uebersee. The other avenue in which your Honor would look at this question of personal taint would be the man's general conduct. There is one thing on which Mr. Baum and I agree and on which strangely enough, our proposed findings agree.

We agree that Fritz von Opel, before the war, was very active in assisting his father in managing his father's property in Germany. Mr. Baum apparently draws from that filial activity some taint.

We submit to your Honor that Fritz von Opel's activities in assisting his father in the management of his properties and in the safe management of those properties surely cannot be made the basis for confiscating his property in the United States.

Oral Argument of Edward J. Ennis

On another thing Mr. Baum and we have submitted to you quite contrary findings. Mr. Baum has asked you to find that Fritz von Opel was pro-Nazi and anti-semitic in his sentiments. I have asked you to find that Fritz von Opel was anti-Nazi and not anti-semitic in his sentiments.

What I rely upon are the facts of the man's life, the friends he had, the things he did. Fritz von Opel numbered not only among his personal friends, but there is no question about it, his associates, the people who worked for him, his lawyers, there was not the shred of evidence that Fritz was [4146] anti-semitic.

To support the contrary view, Mr. Baum brings in that poor threadworn story about the Israel de France, which Mr. von Opel thought, and told you he thought, was a funny story, perhaps a misplaced funny story, which he got from his deceased friend Dr. Frankenberg, himself a person of the Jewish faith.

I won't list the names here, but I have heard that every great liner in the Atlantic at some time in the 30's had some Jewish title to it. I don't think that there is any real significance to that or that it can be made out in this record or anyway that Fritz von Opel was pro-Nazi or anti-semitic.

Indeed, I don't see what it would have to do with the case. Even if he were, surely the Congress of the United States has not enacted a statute that people's property is to be confiscated on their political or racial views no matter how wrong those views might be, but I won't dwell on that, your Honor.

If you feel any finding at all is necessary, you will make a finding either along the line I have requested or as Mr. Baum has requested, as you understand the evidence.

Just a word about other grounds that Mr. Baum has relied on apart from taint—I will leave that now—and say to your Honor another ground which Mr. Baum has asserted in [4147] this case that Fritz von Opel is an enemy because he acted as agent of his father and also that Fritz von Opel is a statutory enemy because he did business in Hungary.

I would find it quite satisfactory to get a decision that it was too late to raise those grounds, because in the pretrial we had said that the question was his enemy taint.

I hope your Honor can see our view of the case, that there was no basis for holding a man as an enemy where he is agent for his father or he is doing business in Hungary.

Certainly I have not the technical objection, but on the merits, your Honor, of it. The statute does not say anything about agent of an enemy. It says did you reside in enemy territory, did you reside outside of the United States and do business in enemy territory or were you the agent of an enemy government.

In the first trial, the Government claimed that Fritz von Opel was the agent of the German government. That has been dropped, and there is substituted that he was the agent of his father, and where do we find support for an argument that an agent of an enemy is an enemy within the meaning of the statute? You don't find it in the statute, so the Government draws out, as they have done in several cases, the old Executive Orders dealing with the freezing regulations and the vested property and seizing from nationals for the purpose of seizing controls. In their premise, they blithely jump over [4148] the gulf between the power to vest and the power to retain property in a Section 9(a) suit and ask your Honor to incorporate these Executive Order definitions, made for another purpose.

They did not look at Section 2 of the statute. They tried to do that in the Guessefeldt case, and the Supreme Court in Mr. Justice Frankfurter's opinion says very simply that there is a great distinction between what property the Government can take as a part of a wartime control and what property it can retain, in a Section 9(a) suit to recover.

I won't take a great deal of time on that; I have set it forth in the brief, your Honor; and those things just do not apply in a 9(a) suit to recover property and the courts say so. The Supreme Court has said it and the Court of Appeals has said it.

As to doing business in Hungary, Fritz von Opel testified that the only business in Hungary was Transdanubia, which was wholly owned by Uebersee. Your Honor has held that the evidence did not establish that Uebersee did business in Hungary during the war with Hungary; and since the only business was Transdanubia, if the plaintiff corporation which owned Transdanubia was not doing business in Hungary, I cannot for the life of me see how Fritz von Opel personally was doing business in Hungary, since he testified—and there was no contradictory evidence offered—that the only business he had any business in or had any interest in was [4149] Transdanubia.

I say to your Honor that your Honor's decision that Uebersee did not do business in Hungary disposes of this question, whether Fritz von Opel was doing business in Hungary; but I have no objection.

The Government in its brief did not point out—and the statute is perfectly plain, it says you have to be a resident outside the United States doing business in enemy territory. Why does the statute say that? Because if you are in the

United States your activities are controlled by Section 3 which makes it a crime to trade with the enemy.

Since the United States Government cannot, by its criminal laws, reach people outside of the United States by making their activities a crime, it reaches them in another way.

It says that if they are outside the United States, resident outside the United States, and you are doing business in enemy territory, we will designate you an enemy, because the only control we can assert over you is by designating you an enemy and dealing with any property we may get of yours.

Was Fritz von Opel resident outside the United States within the meaning of Section 2 of the Act? He was here from 1940 through 1950. True, he was domiciled in Switzerland. It is not an easy question as to just what residence is. It is something less than domicile, and it is something [4150] more than being a visitor.

Under the tax statutes, where the matter has come up, quite frequently many aliens from Europe were caught here during the war, and they stayed here during the entire war and tried to take the position that they were not residents in the United States but were aliens; but the mere fact you haven't gotten an immigration visa isn't important.

You have been here for years and are taxed as residents. I say that that is a persuasive analogy for purposes of that statute, considering the purpose of the act to control people outside the country under one section, and to control people inside the country by another section.

But Fritz von Opel was not resident outside the United States and was not doing business, even if his conduct outside the country might have come under this heading. He was not doing business in Hungary.

But we rely primarily on the fact that factually he was not doing business in Hungary.

One point additionally I have suggested from findings to into the conclusion, your decision preliminary to trial on the question of res judicata and German and Swiss law, German law applying rather than Swiss law, I don't think it at all important that that be given as a conclusion of law. The record shows the decision.

I thought it would be, however, quite convenient if [4151] all your Honor's legal views do finally appear in one paper, and I have suggested that. As I say, it is not important to conclude them again, but your Honor will consider that.

I think I have about covered what I intended to say, your Honor.

Judge Arnold would like to say a few words on the aspects of the case, so I will close my argument with pointing out to your Honor that in 1935 the Government pressed the point that Fritz von Opel-Uebersee should not get its gold because Fritz von Opel was the real owner, and the Government sued.

The Government kept the gold, some hundreds of thousands of dollars worth. On the first trial they pressed on your Honor that he didn't get any gift at all, the whole thing was a sham, which your Honor denied, and many other points which your Honor denied.

But they pressed very hard that under German law there was a usufruct, and now on this additional round we have got an entirely different contention, so we have run the whole gambit.

ORAL ARGUMENT OF THURMAN ARNOLD

Mr. Arnold: May it please the Court, I will try to be frank. I think this case is disposed of in the Kaufmann opinion. I am reading Mr. Justice Black's language:

> "In view of our holding that Congress has recognized that nonenemy stockholders of nonenemy foreign [4152] corporations have a severable interest in corporate assets seized by the Custodian, it follows that the allegations of these petitioners entitle them to intervene. These allegations, if true, show that petitioners' interests may be inadequately represented and that they may be bound by a judgment in this corporate action."

That is as clear as it can be, and I need not add to Mr. Ennis' argument the fact that we are just not enemies. I want to emphasize that Mr. Justice Black talks about nonenemy stockholders. It can only be construed to mean "innocent of being enemies." It doesn't mean that Mr. Jelke, who is certainly not an innocent man, can have his property taken from him. It did not mean that these people lost their homes.

They were put in jail. The definition of enemy must be defined as to these very things.

Mr. Justice Reed, who doesn't like this decision—there were three judges who did not like the decision—equally recognizes that the effect of this decision, and the Supreme Court must have known it, is to give the property back to people who invested in an enemy tainted corporation. He says they will get it all back since they are not enemies, will get it all back; and he cites the definition of enemy.

So there is a conflict between the Court. I can see reason on each side. This ought to be that hazard of an investor [4153] who sees the corporation just as if the corporation was burned by fire, destroyed by shells, or seized by the government. I can understand why they would say that is too bad, the stockholder loses.

I can clearly understand how they would say, well, the purpose of this act, after all, is to confiscate the property and to pay reparations and a nonenemy corporation which is tainted can't ever get anything back from the German government and so it is inequitable to do that.

But the Government here has got to get in between those decisions. They have got to create the concept of enemy taint in an individual. An individual, whether he be foreigner or American, is entitled to protection of his property by due process of law, and the war powers can make certain exceptions of that and the existence of war may be a reason why the ordinary application of the due process of law clause is modified; but only Congress can do that, and Congress, as Mr. Justice Black said, didn't do it.

I sat through this trial with a sense of unreality. Certainly I would concede that if we are going to have this definition of innocence, this definition of the taint of an individual, if you are going to try an individual, his worthiness or unworthiness of character, as Mr. Baum brought in, was right—letters to his wife, attitudes towards his parents, everything in the world—perhaps he should have [4154] brought in a psychiatric report, perhaps there was some psychiatric testing—odds and ends picked up about anti-semitic remarks, an attempt to prove he was pro-Nazi, all those things that I had never thought could be tried in American courts, a man's opinions, attitudes, associations on trial; a judge called on to make a finding about them.

I am going to argue the Peters case on the 19th, and I will argue that even when it comes to a Government job, to which a man has admittedly no right, you cannot try his opinions and associations and his general character.

If that case may come out to where you depart from the usual law, and say that a man's character is something that can be tried in order to take away his post, be he alien or be he an American citizen, I would think that that is beyond the due process of the court.

The court need not reach that decision, because the first point the court has to reach is to say that Congress has in the past, or what Mr. Justice Black says is to say that Congress has created a thing called enemy taint of an individual or the doctrine that unworthy pro-Nazi, anti-semitic individuals should have their property taken away from them, if the court thinks that is the kind of people they are.

That flies in the face of Mr. Justice Black. Congress simply hasn't done it.

[4155] I point out to your Honor, if you did make that finding, and Congress did say we could go in and prove Mr. Kaufmann, who is an American citizen, joined several Nazi organizations and used that same test to take away his property, I think there would be a grave, grave question of due process in this case.

As I say, the courts state that there are two positions, both of which were defensible. The court did take quite a jump, it seems to me, when they imposed on the corporations, treatment of corporations, this doctrine of enemy taint, but since it is control that we are talking about and not character, I think you don't have that problem I am now raising.

The second jump by the Government, as it were, is to try the worthiness of Fritz von Opel as an individual. I don't think that is a thing which does not come under the due process clause.

Mr. Ennis: I have no further argument, your Honor. I just wanted to make the point that our failure to discuss Mr. von Bibra's testimony was not because we have any fear of it, but Mr. Baum with Mr. von Bibra's testimony has already posed some 10 findings, I think, just on the letters and Mr. von Bibra's testimony.

All I am going to say, your Honor, is that that must be considered in the light of the fact that there was no concealment [4156] of the parents' interest in this property.

Fritz von Opel's position might have been far different and his actions in regard to his German parents very important if this was a case of concealed assets in the United States, your Honor, and keep in mind that these interests were in a record, in an action between the Opel's corporation and the United States Government as early as 1935, so that we are not dealing with some of the cases that are reported, your Honor, where assets have been concealed or title has been concealed under some false names.

In that situation the relations between the real owners and the German Government officials might be a very important thing. That is not the case in this case.

The Court: I will hear you about twenty minutes more.

ORAL ARGUMENT OF MYRON C. BAUM

Mr. Baum: If your Honor please, I would like to first outline the course I would like to follow in this argument.

I believe that your Honor would prefer that I try and argue in line with my proposed findings so that you could follow them down, and I intend to do so in large part.

Before I do so, however, I would like to discuss a few general topics, one of which was the opening one discussed by Mr. Ennis. Also before I begin, your Honor, I would like to call your Honor's attention to a purely mechanical fact.

Oral Argument of Myron C. Baum

In preparing my brief and my findings, I was not aware [4157] that your Honor had in his possession a copy of the printed record, so all my record references are to the transcript for the first trial or the transcript of this trial. I beg your Honor's pardon for having caused you any inconvenience in that.

I knew the transcript was here, but I didn't know the printed record was here.

If your Honor please, Mr. Ennis started his argument as I wish to start mine, talking about the opinions of the various courts, including this one, and the lack of evidence on German law.

I might say at the very outset, your Honor, that listening to that argument makes me believe almost that the last six years have just not occurred. I say that in utmost seriousness, your Honor.

We were before the Court of Appeals, and we were told that this is a case of a plant subject to the usufruct, nothing else. The Court of Appeals affirmed that.

We were in the Supreme Court, and I remember too so vividly, your Honor, when the Supreme Court was told this is a case of a plant subject to the usufruct, nothing else, Mr. Chief Justice Vinson leaned over from the bench, and he said, what about the findings in the record about control by Frankenberg?

That I think really puts in focus what we are confronted [4158] with here. Mr. Ennis calls it something about German law, not American law. I don't know what he means by that. He seems to think this case can be argued in terms of some kind of abstract theory.

I say to you it has to be argued on facts. That is the difficulty we have had before, and that is the difficulty we are having now.

The facts are simple. The gift agreement was drawn. The gift agreement alone, without any other evidence, would have created the rights after necessary possession was given, which your Honor found; but your Honor didn't stop there and neither have the other courts. Mr. Ennis says there was nothing more.

Your Honor will recall, I don't remember how many witnesses were on trial there the first time—it went on for five or six weeks of testimony—but there was the testimony of Mr. Houghland, Mr. Crittenden, Mr. Frankenberg himself, the President of Uebersee—all were asked who was controlling Uebersee, who was controlling this property.

What did they say? They all said Fritz von Opel was powerless, it was his father who ran it, his father through Frankenberg, and when there came a point, as it did on several occasions, of conflict of decision, it was Wilhelm von Opel whose opinion prevailed.

I can mention one just offhand. It appears in the record. [4159] It is the famous telegram that Fritz von Opel sent to Mr. Houghland:

> "Overseas investors intend selling spur shares, what I personally deeply regret."

I recall who were the overseas investors and it was agreed to by your Honor and your Honor reached the obvious and necessary conclusion as to who they were, so I think we come to the next point.

First, your Honor's finding of opinion, we come to (a) a basic German law; (b) what the parties did. What the parties did cannot be just thrown away and forgotten and see what we can read into this case from the German Civil Code.

That, I think, is utter nonsense since we have had testimony that they could and did make additional agreements. Your Honor so stated. Your Honor found in a number of findings—I think six or seven to be exact, starting around Finding 40 or thereabouts—that Hans Frankenberg controlled the policies and activities of Uebersee Finanz Korporation as agent of Wilhelm von Opel.

Your Honor further found that the activities of Fritz von Opel which were carried on on behalf of Uebersee were to a large extent under the guidance and direction of Wilhelm von Opel or his agent Frankenberg. That is where we agree, your Honor. Not any less than that.

We go up before the Court of Appeals on that record, [4160] and the Court of Appeals says this is a serious problem. This is what the court was faced with: the court points out that this is not just some theoretical interest, something which you can only find in certain sections of the German Civil Code. No, they say that this was the real economic ownership of this vested property.

They also found that Fritz von Opel did not have a 20 percent interest in the vested property as Uebersee urged upon it on the motion for clarification, nor did he have an in rem interest in 20 percent of the dividends.

The same thing happens in the Supreme Court. Mr. Ennis calls that two different things. First he calls it a comment, and then he calls it a finding of American law. I think, your Honor, I need not argue to your Honor that the Supreme Court is not in the habit of passing off idle chatter as a guidance to the law courts. Its opinions are entitled to the respect which they richly deserve.

As far as there being a finding of American law, I think all you have to do, your Honor, is look at them. The Supreme Court's opinion is, I think, slightly shorter than your

Honor's opinion, and a unanimous one, and what does it say? It recites the basic facts. It recites Finding 52 verbatim, and then it says this:

> "From October 5, 1931, the date of the usufruct agreement, the usufructuary property was controlled, used, [4161] and in all ways handled and directed by Wilhelm and his managing agents. The interest of Fritz in petitioner was wholly subordinated to that of Wilhelm."

Is that a finding of law, or is that a statement of fact? It just seems so clear to me that what the Supreme Court was saying was, yes they created this institution under German law, but they went further and they agreed between themselves that Wilhelm von Opel was to run that property.

Mr. Ennis—and I think it appropriate at this point—used an amusing illustration of an apartment house in Washington, D. C., in which all the tenants were Nazis. That is a very good illustration, because it contradicts his own argument that we had only a civil code usufruct, then the legal owner could, if he wished to, as your Honor found, since he has a voice in the management, prevent his father or whoever the usufructuary was from inhabiting his apartment house with Nazis; but, no, Mr. Ennis' illustration was, well, that is what he has to do to get this property from his father. That is precisely my point: he had to accept this arrangement, he had to accept this complete control.

He gave up whatever rights he may have had in it under the Civil Code to have a co-possession to prevent the sale. He gave that up.

The Supreme Court found that a piece of the property, a piece of the assets of one of the vested corporations, was

[4162] sold, in fact, to pay part of Wilhelm von Opel's fine in Germany. That was not made up either, your Honor. That came from the record, and it is supported by testimony in the record; so what I say is what we are really confronted with here is that if we return to the premise that a legal owner under the German Civil Code has certain rights, we must then look to see if he insisted on those rights, which brings me to this issue of subordination.

The Supreme Court mentioned that at least twice. It said once the interest of Fritz in petitioner was wholly subordinated to that of Wilhelm.

It later said:

> "The interest of Fritz was wholly and in reality—remember that word 'reality', your Honor—subordinated to Wilhelm's except as to the right of Fritz to receive 20 percent of the income from the usufruct property. Petitioner was neutral in name only. Its enemy taint was all but complete because of the predominant influence and control of Wilhelm. Wilhelm had actual and beneficial ownership, while Fritz had the bare legal title; . . . "

That is not just a statement from the Gold case, bare legal title; it is now in the Supreme Court.

> " . . . and such right as this gave Fritz, he exercised or failed to exercise in complete subordination to the will [4163] of his father."

I think that sentence is perfectly clear. What the court is saying is assuming Fritz von Opel started out with certain rights, he didn't choose to exercise them, he gave them to his father, and although his father was not the legal owner, his father was enabled to act as if he were.

Oral Argument of Myron C. Baum

What my brother says, we are trying to try this case on a different theory, we have urged a usufruct before, and now we are trying to urge ownership, that just isn't so. We urged usufruct before, and we urged German law before. We also produced all the testimony on who controlled it.

We also were told by Uebersee and Fritz von Opel that that was so. Several witnesses testified that they thought Fritz is Uebersee and Uebersee is Fritz. Your Honor's finding, I think, means that Fritz is Wilhelm, and Wilhelm is Uebersee, and I think, your Honor, that that is a most important part. I think it is important, your Honor, for this reason: we tried this case in what I consider a very unreal atmosphere.

We tried it on certain issues which we believed were supported by the evidence, but we certainly did not go over the things that had been determined and so said.

In that trial we lost sight of the whole picture of the usufruct. I think we have to come back to it now because this intervener is asking the court to say that although [4164] Wilhelm von Opel controlled, used, managed, and held the shares of Uebersee and vested assets, he therefore could not recover, that we should give it all back to Fritz von Opel.

That is another reason why I say to your Honor that the last six years seem to be unreal. We have accomplished nothing. That includes your Honor's opinion and the two appellate courts as well. We have accomplished nothing if his argument is to be taken at its face value.

Now, your Honor, the next general subject I should like to come to is one which is a little involved, but I will start it. In the first place, we have been told that this is not a case where the property was concealed. This is a case where everything was open and above board; but let's look at that.

Intervener asks your Honor to make a finding that all of the interests of the parents were set forth in full in the Gold case. Those interests, we will see shortly, are quite different from what Uebersee or Intervener Fritz von Opel has ever admitted them to be.

At the first trial we were told that Fritz von Opel had the right to prevent the sale of the shares; that he had a voice in the management of Uebersee and that his father was just entitled to draw some income from his usufruct, if one existed.

You remember, your Honor, that we were resisted on [4165] whether one existed, not only on whether it was waived after it was created, but it was in fact denied that Frankenberg had ever been set up as the agent and had been given possession under the usufruct.

We fought through every single step of the way, and it was only by your Honor's evaluation of the evidence that we have come even that far, so that we start with the Gold case, and we are promptly met with a denial of everything stated in it. We are first told that there was no usufruct.

We are then told if there was one, it was terminated, even though it was terminated, as your Honor will recall, while this Gold case was pending in the courts of the United States, and now we come here and we are told, oh, but I was the one. Fritz says, I was really the one who was running all this, my father left everything to me. It was really all mine.

Then we are told the Government is trying to throw in opinions of the courts instead of proof of German law. There are two answers to that, your Honor. Finding 52 in our opinion is important. It specifies the rights of the parties.

It is true it starts off, a usufructuary has the following rights, but it says, for example, as it does: "The usufructuary has the right to a voice in the management."

It obviously means, and we believe it does mean it, that the legal owner also has a voice in the management when [4166] they have co-possession, and it also means copossession with the legal owner when it talks about preventing sale or disposition.

It is obviously a reciprocal right with that of the legal owner so that the question of what are the rights of a legal owner is a question of logical subtraction not a question of proof; but beyond that, your Honor, we are not concerned with these theoretical findings that my friend has submitted to you.

They are all very interesting. Your Honor could read the whole section on usufruct in the German Civil Code, which is in evidence; but I say to your Honor it just has nothing to do with this case.

It is the starting point and nothing more, because your Honor must see what happened and what was done by the parties. That is certainly the best evidence, and I think the net effect not only of what your Honor and the appellate courts have said but of the facts themlselves is that this was Wilhelm von Opel's property to use as his own during his lifetime. That I think is obvious.

He did what he pleased, and he didn't do so when it did not please him. Fritz had nothing to say in the matter. The proof of the rights, therefore, is not a proof of an abstract, but proof of a fact. Those facts have not only been proved but determined.

The Supreme Court was not just making language that [4167] would sound nice and beautiful in the reports when it said this was Wilhelm von Opel's property to do with as he saw fit. They looked at this record; they had the entire record before them; and that is the view they took of it.

The Supreme Court, I think I hardly need urge, is a court that is entitled to some consideration in the decision by this court. And, your Honor, that was the reason, as Mr. Ennis correctly stated, for my hypothetical question to the law expert on the effect of a usufruct of what Mr. Ennis has consistently chosen to call a vague right of disposition where the rights of the legal owner are subordinated.

I did not invent those terms, your Honor. They come right out of the opinion, and that is the reason why we put in evidence that German tax court case in which it proves two things; it proves (1) that you can have a case in a German court where you create a usufruct, but where the usufructuaries reserve to themselves all the rights of owners because in that case, if your Honor will look at the exhibit in evidence, you will find that the parents had all the rights of ownership except the formal legal title in the land register.

The second reason why I think that this is important, your Honor, is to show how a German court deals with it. It dealt with it exactly as our Supreme Court would. It said the rights of the legal owner just are without significance [4168] because they amount to nothing but formal technical, theoretical rights, because the parents continued to exercise control over the whole matter.

Now, your Honor, I would like to turn to another matter.

The Court: I suppose this is a good stopping point, is it not?

Mr. Baum: Yes, sir.

The Court: I have agreed to take some sentences Monday morning at 9:30, so if you gentlemen will be here by 10:30 that will be plenty of time.

Mr. Baum: Thank you.

The Court: Then we will resume at that time.

(Thereupon, at 4:00 o'clock p. m., the Court was adjourned to reconvene at 9:30 o'clock a. m., Monday, April 4, 1955.)

* * * * *

[4171] PROCEEDINGS APRIL 4, 1955

Deputy Clerk: Uebersee vs. Brownell.

Mr. Arnold: Your, Honor, could we adjourn at ten minutes of twelve? I am on a judges' committee, I would have called your attention to it Friday, but I forgot about it.

The Court: I did, too; I would like very much to be over there, myself.

We will run to twelve o'clock.

Mr. Arnold: Twelve will get us in late.

The Court: I meant a quarter of, and I will resume this afternoon and finish up. I am cancelling all these other cases this afternoon.

ARGUMENT ON BEHALF OF THE DEFENDANT
(Continued)

Mr. Baum: Your Honor please, when we adjourned on Friday, I had called to Your Honor's attention the provisions of the opinions of this court and the appellate courts in connection with the facts of this case, as I choose to see them.

There is another very important facet of this case which has also, I think, been slurred over until very recently, that is, it is slurred over in this stage of the proceedings, and that, Your Honor, is the famous Gold case.

Mr. Fritz von Opel took the stand in this second trial and he said he revealed everything in the Gold case and, based on that testimony, counsel has submitted a proposed [4172] finding to that effect. My difficulty with it, Your Honor, is that although we have always urged that the Gold case was a true statement of the facts, neither Uebersee nor Fritz von Opel is willing to be satisfied with it and the reason, I think, is very clear because the Gold case sets forth the rights of the parties exactly as we are contending them before Your Honor.

Counsel said that I relied on the affidavit of Fritz von Opel; in part, that is true. I also have quoted in my reply brief, which has been filed here with Your Honor, a portion of the affidavit of Mr. Wronker-Flatow, the draftsman of the gift agreement. I used the affidavit of Fritz von Opel for several reasons. I know he is not a lawyer, but he certainly is a party to this transaction and may be presumed to know what it is about and he is the one who said that "naked title only to the shares was transferred to me." That is in his affidavit and appears at page 45 of the Gold case record. And it was in that same affidavit, on page 46, that Mr. von Opel says that:

> "In connection with the execution and delivery of this deed of gift my father received an oral stipulation from me which was not included in the document."

and it goes on to the effect that the holding company would be established.

[4173] I cite that only as illustrative of the fact that, as we argued before and as we still contend, the gift agreement did not embody all the understandings of the parties.

But now we come to the very important thing. Counsel has said that Mr. von Opel and Uebersee were represented by very able counsel in the Gold case, undoubtedly that is true, no one would dispute Mr. Davis' reputation, but Mr. Davis submitted a memorandum to the court which says as follows:

> "Under German law as explained by Dr. Wronker-Flatow, and under Swiss law, as explained by Dr. Meier, the right of usufruct constitutes a right in rem, and the retention of the usufruct by the grantors under the deed of gift effected a partition of ownership such that Fritz von Opel, although holder of legal title, was deprived of the beneficial enjoyment of the gift during the lifetime of his parents."

In the same memorandum, we find this statement:

> "Ignoring the corporation for the moment and looking solely at the individuals interested in the gold, we find that Fritz von Opel is not an 'owner' of the gold within the meaning of the Act of March 9, 1933, and the subsequent Executive Orders, because of the outstanding beneficial interest in Wilhelm and Marta von Opel."

[4174] Dr. Wronker-Flatow says if part of the proceeds of the gift were used to purchase the gold, then the usufruct attaches to the gold as well.

Then we come again to the memorandum of Uebersee's attorneys and it says:

> "the usufruct reserved to his father and mother by the deed of gift, and the interest of his sister, effect a reservation of independent and substantial rights in rem which deprive the nominal stockholder of the use and enjoyment of the shares."

Continuing:

> "Hence, even if the corporate entity were in this case to be merged with the principal stockholder, and the gold to be regarded as held by the corporation for Mr. Fritz von Opel, the fact that it was purchased with funds which were proceeds of the Opel stock described in the deed of gift, would cause the reserved usufruct to attach directly to the gold. This means, of course, that the entire beneficial enjoyment of the gold would inhere in Wilhelm and Marta von Opel, non-resident aliens not subject to the jurisdiction, while (the Uebersee apart) only a naked legal title analogous to trust or custody would remain in Fritz von Opel."

And then they make this surprising thing, Your Honor, and I [4175] remember Your Honor asking at the first trial why was all this done in the Gold case; and here is the answer, sir:

> "Under these circumstances, we would suggest that the gold here involved falls within the opinion rendered by the Attorney General to the Secretary of the Treasury under date of May 25, 1933. Pointing out that the executive order of April 5, 1933, is applicable by its terms only to the 'owners' of gold, the Attorney General says:
>
> > 'Such language does not include a bare custodian, and accordingly those who within the continental

> United States hold gold in custody or non-resident alien owners are not required to comply with its terms by surrendering the gold thus held.' "

And the Attorney General says it also does not apply to people holding it in trust.

So what they were doing there, Your Honor, was to try to fit this case to the Attorney General's opinion and say Fritz von Opel was merely holding it in trust or custody.

Now, are we to take that or are we not? Is Fritz von Opel to be allowed to shift his position every time he comes into court or must he be held to a consistent position? I think Your Honor, the last time, held him to it and I think you should do so again.

[4176] That leads me to the next observation I would like to make to Your Honor, which revolves around an old subject in this case, namely, the credibility of Fritz von Opel. The Gold case, I think, is only one illustration of the lack of such credibility because in dealing with it, I think the best way to describe it and to describe Fritz von Opel's handling of it is, "Now you see it and now you don't." The Gold case is fine, "Yes, sir, I revealed everything," but are the facts true? No. We have heard Fritz von Opel testify there never was a usufruct, if there was, it was waived, it doesn't mean all the things we said it meant. We go through this every single time, Your Honor.

Now, he comes in and says the rights of his parents are set forth in full. If that is true, fine. I think, Your Honor, I need not labor Your Honor in recalling the week of testimony of Fritz von Opel at the first trial nor the two days or more at this trial, but I would like to go directly to some very important aspects, and the most important and conspicuously overlooked in my opponent's argument are the letters to and from Mr. von Bibra. Even without reference to Mr. von Bibra's testimony, those letters, Your Honor, are very, very serious documents. The letter to Mr. von Bibra which is Intervener's Exhibit 6 proposes a thorough cloaking scheme to conceal the ownership of these very assets that are here involved from the United States government. He says [4177] that in order to preserve them for the German Reich and to prevent the United States from seizing them, he must go through this change of citizenship on a temporary basis for the duration of the war. I think, Your Honor, right off the bat, the letters are so clear, so plain, so detailed and so well thought out as appears from their face, that this lame explanation that this was all a big joke is not worthy of any consideration. But in case Your Honor has any doubts about it, I think it important to note several points.

The first of these, Your Honor, is that the letters, and particularly the first one, Exhibit 6, are substantially corroborated by Mr. von Opel's testimony. If Your Honor will recall, I asked him about the letter, paragraph by paragraph. The opening paragraphs are more or less introductory, and then we come to the paragraph where he says:

> "My lawyer has gone to the ministry of interior in Berlin to undertake negotiations about this matter and he has been told to clear it through the appropriate diplomatic legation."

Mr. von Opel said that was true, he admitted that, Your Honor, and I have the appropriate record reference in my findings.

So here again, I think we have a showing that Mr. von Opel is just not playing square with this court. He just tries to hide, conceal and do everything to keep out what is [4178] damaging to him. For example, and we had the most recent example on Friday, Mr. von Bibra testified that this memorandum of the German foreign office was prepared by him, and what does it say? On September 4, 1939, Mr. von Opel is suggesting a good Swiss citizen who might be available, if properly approached, for the purposes of the German government in the event of outbreak of war to obtain foreign exchange for the German government. This is the man who had exposed himself as an anti-Nazi, who wouldn't have a thing to do with the German government, who, as you heard him say on the stand, "You don't understand the political set-up in Germany, where here in the United States you have only two parties and they don't make much difference, whereas in Germany you have dozens and you can like your people and not your government." So I say, Your Honor, no credence, based on this entire record, can be placed in Fritz von Opel's testimony.

Now, Your Honor, I would like to turn to the proposed findings we have submitted, which start out with the von Bibra letters and the transactions surrounding them. As Your Honor will note, since the findings herein are deemed to be supplemental, I have started the numbering after the finding 56, which was the conclusion of Your Honor's findings at the previous trial. I thought that would eliminate any question of which findings we were talking about later.

In finding 57 through 73, I have set forth in individual [4179] pieces the substance of the von Bibra letters and the conversations they had between themselves.

Now, on those letters, Your Honor, there is one thing that is of extreme, striking significance. Fritz von Opel said, in effect, that this was a little scheme that they cooked up to fool the Germans, incredible as that explanation must be, but I will pass it for the moment, Your Honor.

Mr. von Bibra was called to the United States to corroborate that story. I listened to his testimony for two hours on Thursday, I listened for about two hours on Friday, there is not one word of corroboration in his testimony, Your Honor. He didn't say anywhere that Mr. von Opel was fooling the German government. What did he say? He said, "I was trying to help Mr. von Opel." He doesn't say why, he doesn't say, "Because Mr. von Opel was a good friend of mine," although he indicates that that might be one of the reasons. He doesn't say it was because he was a great anti-Nazi, he just said, "I was trying to help Mr. von Opel."

It is true he said Mr. von Opel came and offered his services, in fact, he even said that that was more or less necessary because the other Nazis in Switzerland would have required that before he could have done anything for him. Then, as he pointed out in his statement which he gave to Mr. Laufer in 1947, he said the von Opels have exposed themselves as opponents of national socialism to such an extent that they [4180] couldn't think of returning to Germany.

I just ask Your Honor to think about that for a moment. Is it credible that a German diplomatic official of considerable standing would enter into this transaction, which really didn't mean what it says, to protect Mr. Fritz von Opel or to help him? Would he think that anyone in the German government for one minute would place any credence in it if it were true, as he says, that Mr. von Opel was such a well-known opponent of national socialism? If anybody came to the United States government, and said, "I am going to help you," let's assume it was Mr. Hitler's deputy and he said, "Now, I am going to help you," who would place any credence in it? They would say, "You have been our enemy all this time, we will have nothing to do with you." That is the same situation here.

Mr. von Opel sat in that chair and he said, "Mr. Baum, from 1933 to 1939, the Germans tried to get me to bring my property back to Germany and I consistently refused." So now he comes to the Germans and he says, "I am doing all this for you. I want the citizenship all arranged, I want this all arranged because this is all a little scheme and we were going to fool the United States."

Now, he says if anybody saw that document that they would think that he was really doing it for the German government. But who would assume, would they assume that President [4181] Roosevelt would have been doing that for the German government? It is the same thing.

So I say to Your Honor that the explanations are all specious and the documents are plain; they are plain anyway, they are corroborated in many respects. In the one that I mentioned to Your Honor about the interview in Berlin, he said that is true, he said his lawyer reported to him that he should clear it through the legation. Clear what? That his lawyer in Berlin go up to the German government and say, "I want to cook up a little scheme to fool you"? Of course not, he went up there and talked about a change of citizenship with the assurance of getting it back.

The same is true of his statement that, "My lawyers are of the opinion that the safeguarding and the cloaking measures thus far taken will not fool the American authorities for any length of time." He said he doesn't know what those cloaking measures are; he also quarreled with the translation of the word "cloaking," he said "smoke screen" would be more appropriate. I think it makes no difference; but he said his lawyers did tell him that. This time it wasn't Dr. Gros, it was Dr. Meier, the president of Uebersee, and Mr. Engler, who was another director. He said he doesn't know what they were talking about, but that is what they said. But that, Your Honor, just is too much, I think, for an average human mind to sit there with your lawyers in conversation and say you [4182] are talking about cloaking measures against the United States, although I don't know what you are talking about, it is all very interesting. And so we go on.

He had numerous conversations with von Bibra. Mr. von Bibra testified that the material contained in the letter to him of October 24 was stated to him orally by Mr. von Opel. In other words, Mr. von Opel said all these things to von Bibra as well as writing them. One of the significant things, Your Honor, is that Mr. von Opel testified that he talked to Mr. von Bibra and he said, "Write me a letter and make it look good then I will reply in the same vein." Not one word of that import did I hear from Mr. von Bibra. He didn't say that he suggested this letter be written in this form, he didn't even suggest that a letter be written to make it look good, as Fritz put it. He just said these letters were exchanged, he hadn't seen them in years, and so on.

Of course, it is very significant in the case of both Fritz von Opel and Mr. von Bibra that their convenient memory has allowed them to forget these letters all these years. Not once in all his numerous interrogations by the United States government during his internment, in his testimony in these proceedings, has Mr. von Opel ever, prior to his courtroom appearance this time, mentioned these letters although questioned about Mr. von Bibra, even by me last summer in Frankfurt. I asked him about Mr. von Bibra, and not one word, it [4183] conveniently escaped his mind.

Mr. von Bibra admits that eight years ago, when questioned by Mr. Joseph Laufer, he didn't remember all this; in fact, he said his statement that he gave to Mr. Laufer was a bunch of nonsense. When shown the same statement last year by Mr. Charig, again he admitted he didn't say a word either to Mr. Charig or to me about these letters. Nobody has chosen to remember them until they finally came out.

Now, Your Honor, I say to you that if you had conducted such a scheme with somebody, it would either be bothering your conscience or, if it was true, you'd be glad to tell the story and that is what the trouble with Fritz von Opel is. He didn't want to tell it, because he knew how damaging it was.

So I say to Your Honor that the effect of those letters is to make it clear that these two persons, Fritz von Opel and von Bibra—yes, they were good friends and Mr. von Bibra was a very high official of the Nazi party, they were good friends and they did cook up this scheme, but not as a joke, not to fool the German government, to fool us and I think, Your Honor, they cannot be allowed to perfect that scheme through the medium of this court.

Now, Your Honor, in the succeeding findings, and I will try to cover them in more or less general outline so as not to make this presentation too detailed, I have pointed out, I have made a specific request for a finding, Your Honor, that [4184] Mr. von Opel never disclosed the existence of these letters, because I think it is important in this matter.

But then I consider Mr. von Opel's business activities, starting with finding 78 and continuing on through the succeeding findings.

One word before I discuss those, one by one, Your Honor; I would like to show to Your Honor what I had in mind in going through that, what must have been somewhat laborious detail, about Collet & Engelhard and the Machine Factory Wiesbaden, and so forth. What I had in mind, Your Honor, were two things; one, aside from incidental and occasional trips to the United States, sometimes with Mr. Frankenberg, it shows that Fritz von Opel, whether he was physically in Germany or physically in Switzerland, was devoting his entire time to German or the Hungarian enterprises.

It further shows this, Your Honor, it shows what I regard as a consistent pattern and course of conduct, namely, acting as representative of his father. Your Honor has, in effect, found that that is what he was doing in this case and I say to Your Honor that is all he has been doing all his life, at least since 1929 when the automobile firm was sold.

What have been his activities? He, himself, testified that when his father sold out to General Motors, he started to advise him on his financial activities and we had all these investments through Deku, we had investments of shipping shares which I will come back to in a moment, Your Honor, [4185] and then we had the purchase of Collet & Engelhard, the Forest Estate, the Machine Factory, the property administration company, and so forth. Fritz was advising his father all the way through.

It is really his father's property, there is no doubt about that, his father owns the shares of Collet & Engelhard, Collet & Engelhard owns the Machine Factory, his father owns his own assets in the property administration company, his father owns the Forest Estate, but he has Fritz doing the work, and that is what he was doing in Switzerland for Uebersee, too.

Now, we will start off with the shipping shares which are extremely significant, Your Honor, not only for themselves but again as showing the credibility to be entrusted to Fritz von Opel. Your Honor may recall the letter which, I believe, is Defendant's Exhibit 123 in which Fritz writes to his father about the advisability of undertaking the purchase of 7,500,000 marks worth of shipping shares which Mr. von Opel says were Hamburg-America Line, North German and Lloyd shares. That letter, if Your Honor will examine it, is divided into four subdivisions, I don't remember the headings now, but the four aspects of the transaction and under the fourth, at the end of the letter, he says: "We should undertake this transaction in order to show the German government that we are not only interested in profits but that we are interested in working for the interests of the German government at any time."

[4186] What was Fritz' explanation of this letter? In the first place, I never heard any satisfactory explanation for the "we", it was just, "my father and I." But this business about being able to work in the interests of the German government, why was that written? Because this letter was really going to be shown to the public prosecutor, so he writes a letter to his father knowing that it is going to be shown to the public prosecutor and saying the very opposite of what he really meant, because he was in the process of entrapping Mr. Deku.

I say to Your Honor that is just one big lot of nonsense. Here is a letter to his own father in which he is analyzing in detail the advantages and disadvantages of the transaction and this is one of the reasons he urges his father to go through with it.

Was he just playing games? Every time a letter comes up which has something incriminating in it, we get the same type of explanation, "it doesn't mean what it says." Well, then, I say to Your Honor, what does? What kind of evidence is a court entitled to rely on, if every document can be just explained away as blissfully as can be? So much for that.

Now, taking the enterprises one by one, I put in evidence a number of documents relating to Collet & Engelhard and I questioned Mr. von Opel at some length about it because it was my purpose to show to Your Honor that, for a period of four [4187] or five or six years, Mr. von Opel had exercised detailed managerial functions over the activities of Collet & Engelhard as the representative of his father.

If Your Honor will examine the record and the exhibits, you will find that he approved the hiring of personnel, in fact, Mr. Abbetmeyer who was one of the leading officers of the corporation, he said, "I hired him," and he writes a letter which is in evidence which says he is to have such and such compensation, he is to have such and such functions and the other people there will stay away from that part and will confine themselves to other fields of jurisdiction.

He passes on the future policy of the corporation. He says he was a member of the board of directors and that is why he did it, but there were several other members and yet he is always doing things, "I did them."

And so I say to Your Honor, as I summarized in finding 85, that he has supervised and controlled the business activities of Collet & Engelhard, its production schedules, the employment of its personnel, the amount of compensation to be paid to its officials, the purchase of machines, and proposed expenditures.

If Your Honor will remember, there was one letter where the company wanted to spend 250,000 marks for purposes of Collet & Engelhard and that could not be done until Dr. Gros consulted Mr. Fritz von Opel and had gotten his approval.

[4188] The same is true with the Machine Factory. It was Mr. von Opel who wrote a letter and said, "we had two courses, either to contract their operations or to expand; I am an optimist, so I decided to expand." "I decided," he says. In another place he is about to hire a person and he says, "You can do that through the board of directors or through the officers, but I will not be diverted from my objective." In other words, "you are going to hire this man whether you like it or not, I don't care in what form you do it, I am the boss."

And he said very frankly on the witness stand, I must say to Your Honor, that he said certainly when the people in these corporations knew that he was speaking for the large majority stockholder, they paid attention and did what he said.

So he was running these corporations and his activities in the Machine Factory, I think, were in all respects similar, and his activities in the Machine Factory are even evidenced by this letter which is written by his wife, about which there is testimony in Margot von Opel's deposition, in which she admits that Fritz must have told her that he was very pleased at their secretary's interest in the factory and trying to stir these people up to get busy on orders.

The Property Administration, Your Honor, is the most strikingly similar in this whole chain because what do we find? We find that is a company which is known as a company with limited liability; if you will pardon my acting as an [4189] unqualified expert, it is something like a cross between a partnership and a corporation. But its members, they are called members, they are sometimes called shareholders, were Fritz and his sister. But the manager of the corporation, for his lifetime, is Wilhelm von Opel and the partners under the articles of incorporation, or whatever you wish to call them, are not entitled to draw any profits from the corporation. What does that mean? Wilhelm von Opel is in the position of running his own property. He has a shell of a corporation which gives it certain rights and the real purpose of this, of course, is obvious. By putting these assets in the corporation, what has he done? He has taken them out from passing by will in the event of his death, they are corporate property, and then they pass to whomever the members of the corporation are. So what he did was that he made a provision inter vivos for his son and daughter to acquire this property upon his death but not through an estate, through a corporation.

That is what it seems to me, Your Honor, has been done with Uebersee as well. He was making a testamentary disposition, he wanted the benefits while he was alive.

The Forest Estate is, of course, the same and the Forest Estate is owned by the Forest Administration Company, which is owned by the Property Administration Company. And even in the Forest Estate, we will find that Mr. von Opel was doing [4190] everything, he was going to put fish in the estate, he was going to cut down the trees, he was giving the Forest advice on this and he was telling his lawyer how to run the litigation which was conducted with reference to it.

Now, I have come, Your Honor, to the bauxite matters which are found in findings 109 through 121. I would just like to confine myself to these factual matters at the moment. We are well familiar with the history of Transdanubia in relation to Uebersee, but here we found one thing more. This is not an issue that has been previously litigated—yes, we did litigate whether Uebersee was doing business in Hungary in the last trial. Now, we are litigating, if Your Honor chooses to permit it, whether Fritz von Opel was doing business in Hungary and that is based upon these letters and testimony which you now have, which show that he held himself out to these people in Hungary, Salusinszky and Timar, as being Transdanubia, "I am Transdanubia," he doesn't mention Uebersee. He gives Salusinszky in 1936 two powers of attorney enabling Salusinszky to act for Transdanubia and sign the name of Fritz von Opel. When Salusinszky dies in 1939, he gives the same powers of attorney to Timar which were continued and were never revoked, according to any testimony I have heard.

These powers of attorney allow him to sign in Fritz von Opel's name, and what do these agents do? They report to him the progress of the affairs of Transdanubia. It is true, they [4191] are lawyers, but they are not confining themselves to the legal questions; they talk about production, let's get going with production and particularly in September, 1939, Timar writes, "Now that there is a war on, it is very important that we get into production." And then, finally, Fritz von Opel comes to Hungary in November, 1939, as Your Honor will remember, and says he gets busy, he negotiates an agreement, and everything is running fine. If Your Honor will recall, that trip to Hungary was shortly after that famous letter which you quoted in your opinion where the Giulini Bros. write him, "You'd do meritorious service for the German war economy if you would go to Hungary and speed up production," and he did so.

So I say to Your Honor that here we have Fritz von Opel in Hungary; sure, he left and went to the United States and was not physically in Hungary during the war, but I say to Your Honor you cannot evade the plain spirit and meaning of the Trading With the Enemy Act by saying, "I wasn't there," not when you have appointed an agent to act as your alter ego to conduct the very business that you wanted conducted, and I say to Your Honor that by doing that, Fritz von Opel put himself squarely within the scope of the doing business restriction of the Act.

And finally, Your Honor, I have included, because there is no question about it, one or two findings on Fritz' status in the United States as a visitor only, and then findings 126 through 128 are with relation to this little story about going [4192] to the consulate in New York in 1941 to see about the repurchase of the Opel shares. I think that one is interesting, Your Honor, because it shows that although Fritz expressed reluctance to have any dealings with the consulate when, Your Honor will recall, he says people were following him, FBI agents were following him and he was under suspicion and his attorneys told him if he did anything in these negotiations, he would have to register as a foreign agent, he nevertheless tells the consul, when he finds out what it is all about, to wire his father that he is ready to conduct the negotiations. And what does he do next? He runs right up to see John Thomas Smith, according to his own affidavit which is in evidence, to find out what is going on and whether there is anything to this proposal or not, and apparently it turned out there wasn't much to it. I, therefore, use it not to show that he really did something injurious to the United States, but to show that he was always ready, willing and able to do so whenever the opportunity came.

Oral Argument of Myron C. Baum

I think the reason for that is obvious, Your Honor. In Mrs. von Opel's deposition, she admitted that Fritz von Opel's eyes always grew moist when he thought of what she called the "Panther Castle" and the "Ghost Castle" at home, meaning the father's home. She admitted further he was almost a nobody outside of Germany, he was never happy being a nobody and he wanted to be somebody again and when something like this came [4193] out, where he saw a chance to get back in Adam Opel, there was his chance to get back to Germany and become a big manager of a leading German enterprise.

Now, Your Honor, I will try to cover very briefly the respective contentions and some of the things that have been mentioned. Before I do so, Your Honor, I would like to call your attention to one very significant thing which I skipped. In connection with the von Bibra letters, we have not only the corroboration which I had referred to, but we have a very interesting piece of corroboration contained in the record. Defendant's Exhibit 95, which was put in evidence at the last trial, is a letter from Fritz von Opel to Mr. Walter Guyette who was the president of Harvard Brewing Company. It was the famous letter which we used to show that at the time Fritz von Opel became a citizen of Liechtenstein, he was actually in Hungary. If Your Honor will recall, there was a good deal of nonsense about his being unable to take the oath because of his broken leg and, in fact, he was in Budapest at the time. But we didn't know then, of course, what we know now and in this letter, which is printed at page 2288 of the printed record and following, the last paragraph on page 2293 says this:

> "Now, to the last paragraph of your letter, when I saw the war coming and when I thought of the ill feelings or even the hate it might bring [4194] along toward Germany, I thought I should not endanger the

> interests of the Uebersee Finanz-Korporation and the even more important interests of Harvard itself, by continuing in my position especially as director of Harvard. Today, however, things become different. After ten years of residence in Switzerland, I was able to acquire another nationality. I felt myself obliged to do so in the endeavor of protecting the interests of all people and companies in your country and abroad that I am connected with and you, therefore, can rest assured that there is not the slighest change in our relationship."

What I say to Your Honor is this: Here he is, he is afraid of the hate of the German, so he says, "I will take care of that, I will protect the interests abroad, I will give up my German," that is exactly what he says in Intervener's Exhibit 6, it is almost verbatim, the same language as contained in one of the paragraphs of that letter, and this letter is written about two weeks after Intervener's Exhibit 6. He was so busy telling that story, he told it to everybody and I think, therefore, the inference is obvious, it is true.

Now, Your Honor, I set forth my respective contentions in my brief, I will not argue them in detail now. I would just like to cover them briefly. Our first contention is also, Your Honor, one that counsel significantly overlooked until [4195] Judge Arnold mentioned it at the close of the argument, namely, the Kaufman decision. It seems to me that the biggest hurdle in this case is how can you say that the holder of legal title to 97 shares of Uebersee Finanz-Korporation, the same 97 shares which Your Honor and all the courts have found to be enemy tainted, is an innocent stockholder? It just doesn't make any sense, Your Honor.

Judge Arnold picks up the term non-enemy stockholder, he does something which I think he would have frowned on if he was sitting on the bench, he picks up the last paragraph of the long opinion and takes one word out of it, one sentence out of it; throughout that opinion, they use the words "innocent stockholder," and just the one time they say "non-enemy." I think it is perfectly obvious, as I have said before to Your Honor, that in the context of this case "innocent" must have a meaning in addition to "enemy" status. They didn't need that, because if a stockholder is permitted to intervene under Section 9(a) of the Act to assert his severable interest, he of course must meet the requirements of Section 9(a), to wit, that he is not an enemy.

So the court didn't have to say non-enemy stockholders may intervene, that was true, if they allow anybody to intervene, they can't recover. But they said "innocent stockholders" and what they mean is plain, they mean stockholders innocent of the enemy management.

[4196] Your Honor is familiar with the factual pattern of the Chemie case and Your Honor knows that there are large groups of stockholders who are claiming that they had nothing to do with the management or, as Mr. Ennis said, "I just have a few shares I bought on the Exchange, I don't know what has been going on in this company."

But this isn't this case at all. This isn't a man who doesn't know what is going on. He holds all the shares, he holds legal title, he holds them under this scheme to allow his father to continue to exercise control. He is doing things for his father on behalf of the corporation, he is acting in effect on many occasions as his father's messenger boy, and yet he comes in and says he wants to be an innocent stockholder. And I say to Your Honor, as I also said before, that any other result in this case would just make this another absurdity. You would be returning to Fritz von Opel, on some theory of a separate interest, what you have found could not be returned to Uebersee itself; and why would you be returning it? Because Fritz von Opel holds the legal title to the same shares, which are enemy tainted.

Now, Your Honor, this second contention of acting for or on behalf of or as an agent of enemies, there are two things I would like to say at the outset: One, in Intervener's reply brief, he has raised for the first time the contention that that is not encompassed within the pretrial proceedings. I [4197] think the easiest way to answer that, Your Honor, is to take that and that technical objection, and the doing business together, because they are answered together.

In my pretrial memorandum, Your Honor, and the part that counsel has not quoted, I said that one of the issues in this case was enemy status or enemy taint of Fritz von Opel. In Your Honor's opinion on the motion raising the issue of res judicata which, as I understand it, you have considered your pretrial order, you say, once, one of the issues in this case is whether Fritz von Opel is an enemy or ally of enemy and then you say one of the issues that is open is the enemy status of Fritz von Opel.

I think it clear, from those three quotations, that this comes under the terminology enemy status or under Your Honor's more exact terminology, whether Fritz von Opel was enemy or ally of enemy, because doing business makes him an enemy under the statute, and acting for or on behalf of or as an agent thereof, also does.

I say to Your Honor, therefore, I was doing something that was fairly encompassed within the very terms of the pre-trial order. When we had a brief oral discussion of it in court, Your Honor, you ventured the suggestion, although you cautioned us you had not refreshed your recollection on it, that maybe it would have been appropriate to amend the pretrial order before attempting this. I say to Your Honor that there [4198] was no cause for me to seek to do so because, as I read it, these things were plainly admissible; since I was permitted to prove the enemy status of Fritz von Opel, I assumed anything that fell within the definition of enemy contained in the Act would be admissible under that context. If I am wrong, Your Honor, I have honestly misunderstood your order, but I don't think so. So much for that procedural point.

Now, this question of acting for or on behalf of or as an agent of, Mr. Ennis says we dragged that up from the outworn executive order definitions, and he cites some cases which he has, I regret to say, erroneously cited. The definition of "national" which includes persons acting for or on behalf of, comes from Executive Order 8389 which was twice expressly ratified by Congress. The same definition is carried over into Executive Order 9193 which permits vesting by the Attorney General.

Then we come, as the next step in the chronology, to the Uebersee opinion in the Supreme Court the first time, which says we are not held to the definitions of Section 2. If Your Honor will read that opinion, you will see the whole context of it is to meet the new problems which arose out of the second world war, the fancier, if I may say so, techniques for concealing property from seizure; the schemes, as the court put it, masquerading under innocent fronts; the enemy interests appearing as Trojan horses in our midst, those are [4199] all referred to in the opinion of Mr. Justice Douglas and Mr. Justice Douglas is struggling with the fact that Section 2 has not been amended and he says:

> "We think that in order to allow this act to accomplish its purpose, we must say that these definitions are illustrative and not exclusionary. We therefore cannot keep saying that enemy must be a resident, enemy must only mean doing business,"

and so on. They are only illustrative and the court will certainly allow us to show what an enemy can be; and the definition of "national" I think is so obvious as one of those illustrations, there can be no question.

Can anyone visualize for one moment that a man who intentionally seeks to conceal his assets from the United States for the benefit of the German government is beyond the reach of this court under the Trading with the Enemy Act? If Your Honor finds that this correspondence with Mr. von Bibra means what it says and that they really did engage in this transaction for the benefit of the German government, does Your Honor really think that he is powerless to reach that question? I think the answer is plain, of course you can. How can we impute such a ridiculous intention to Congress that we can only find the people who are enemies by residence in Germany? Now, counsel has said that this national definition has been thrown out by the court and he mentions the Guessefeldt case. [4200] Unfortunately, Your Honor, he is talking about a different terminology. That is the word "national" which comes from Section 39 of the Trading with the Enemy Act which talks about nationals of Germany or Japan, and there it was held by Mr. Justice Frankfurter that that term national means not just citizens, as we had contended and as this court and the court of appeals had held, but it meant enemies. But that is not the same national that we are talking about in Executive Order 8389, it has nothing whatsoever to do with the proposition; and the other cases cited on this point by counsel just are not in point, they have nothing whatever to do with this problem.

So I say to Your Honor that if it be found, and I think here we have several illustrations of it, if it be found that a man is acting on behalf of or as agent of an enemy, he must himself be deemed an enemy. Here, I think it occurs largely in three ways, one, Fritz von Opel was an agent of his father for the purpose of holding these Uebersee shares and this Uebersee property so that his father can continue to control it in safety. As Your Honor will recall, it was impossible for Wilhelm von Opel to hold these assets outside the United States under the foreign exchange laws, so he had to have somebody outside to do it, Fritz was the boy.

Secondly, he was an agent of his father or of the German government itself in concealing these assets from Germany in [4201] connection with Mr. von Bibra.

Third, he was an agent of his father in all these enterprises which formed part of this consistent pattern of conduct.

The Court: This would be a convenient place to stop, wouldn't it?

Mr. Baum: Yes, Your Honor.

The Court: I think out of respect for Justice Jackson and counsel's desire to go there, we should adjourn at this time.

Mr. Baum: I have only fifteen more minutes.

The Court: We will do it at two o'clock.

(Thereupon, the luncheon recess was taken from 11:45 a. m. until 2:00 o'clock p. m.)

[4202] AFTERNOON SESSION

(Pursuant to the taking of the luncheon recess, the proceedings resumed at 2:00 o'clock p.m.)

Mr. Baum: Your Honor please, just before we recessed, I was about to discuss the proposition of enemy taint and I would like to come to that right now. It seems that there are two aspects of this problem, one, does it apply to an individual. Counsel has made much of the fact that there is no authority for applying it to an individual; I think there is, Your Honor. I think the authority is substantially to be found, in the first place, in the first Supreme Court decision in Uebersee.

As I said in another context this morning, throughout that opinion the court was confronted with the problem of how to construe this statute in view of the broad amendment that had been promulgated in 1941 in amending Section 5(b). The court had a problem because the statute now permitted the vesting of property of foreign nationals and did not change the definition of enemy, and throughout that opinion, there is reference to numerous source materials, Treasury publications and others, and to the legislative history of the First War Powers Act which amended this statute showing it was intended to give more flexible authority and that it was designed to reach interests, as the court put it, masquerading under innocent fronts.

[4203] I think it is clear from an examination of that opinion that the court was concerned not with just corporations, but with all aspects of what would have otherwise been beyond reach of the statute. It had several problems before it, for example, as Your Honor has been told before, prior to that decision a corporation other than a German corporation could have recovered its property no matter what the nationality or residence of the stockholders was, that was the law in the twenties and the Supreme Court's decision in the Hamburg America case. That was one thing they had to change, they had to say it was appropriate to look at the status of the stockholders. But they were also confronted with all these elaborate proposals and I think one of them is right here, where some one intentionally tries to conceal his property from the United States, that it was designed to reach that. If Your Honor reads that, it starts off with complaint by a corporation and finishes with a statement that fractional ownership by enemies in a corporation may be sufficient, but the whole analysis of the decision is in terms of enemy taint, whether it be corporate or individual.

The second authority that I rely on for that, Your Honor, is Your Honor's own opinion in which you said that where there are various interests in the property, some of whom are clearly enemy and some of whom are neutral, it is important to look at the, I believe the words were, enemy tendencies of the [4204] neutral and you then in the context of your opinion examined the citizenship status of Fritz von Opel where you concluded that he was a neutral citizen in technical form in view of the unusual circumstances of that citizenship, you then discussed the bauxite business and you concluded that the neutral aspect of ownership in this property is insignificant. I think Your Honor was there clearly considering individual enemy taint.

It is very true, as my brothers have said, that Your Honor was considering a corporate complaint, but you were dealing with an individual, Fritz von Opel, and you were characterizing his interests in this case and that conclusion by Your Honor was, I think, approved and I think Your Honor agreed with me on your opinion in res judicata, where the Supreme Court directly quoted that very sentence from Your Honor's opinion in which you said the neutral aspect of ownership is insignificant.

So that I think not only has the Supreme Court in the first Uebersee case given us the guide, but I think in the second Uebersee decision it has more or less approved exactly what Your Honor did in handling this case.

Now, as far as the taint itself goes, counsel has said we are trying Fritz von Opel for his worthiness, we are having a character investigation. Nothing could be further from the truth, Your Honor. This is a war statute, it is a statute [4205] designed to separate enemies from non-enemies. The enemies, we are entitled to take their property as reparations and that is what Congress has now provided. The enemy property is kept, it is to be put in the War Claims Fund, it is to be used to pay our prisoners of war and certain other eligible claimants as Congress may direct. So if it involves investigations of whether a man is really an enemy of the United States or not, then it is a character investigation, but that is what a war statute is for. We have to separate the friends from the foes and as far as character is concerned, it isn't just a man's sympathies and beliefs that we are trying here, we are trying his activities, his whole life's pattern and that life's pattern is German, German through and through. His activities, his business activities are German, his interests are in Germany, his time was spent in Germany, even when he sat in St. Moritz, as Your Honor will notice from the letters in evidence, many of those letters are written from St. Moritz, Switzerland, and yet he is just across the border writing letters and telling these people what to do, how to run these various companies.

Much is made of the fact that I put in evidence letters signed "Heil Hitler." Yes, I did, Your Honor, for a very good reason. I think it is evidence of where his sympathies lie. Two of those or three of those letters were written before the war broke out. The last one, and Your Honor may [4206] well have wondered why I bothered with a letter to a pig breeder, that was significant for one reason, Your Honor; it was dated September 26, 1939, it was written from St. Moritz, Switzerland, to a man in Germany whom Fritz von Opel was about to hire for pig breeding and then abandoned because of the war and it is signed "Heil Hitler." From the safety of neutral Switzerland, he has the occasion to write an insignificant German citizen and sign it "Heil Hitler." I think certainly when the war started in Europe, if he were the great anti-Nazi that he tells us, that would not have appeared in there.

That is why, Your Honor, I have put in under the third contention in the proposed findings two or three additional findings on enemy taint, one of them that he demonstrated his loyalty to the Nazi cause, another one that he was hostile to persons of the Jewish faith. As far as that one is concerned, Your Honor, we have had several instances of that. We trotted out what my friends called this old, worn SS Ile de France letter which appeared, by the way, for the first time in this case and whether it is a joke or not, it was certainly a very poor one. This was written in 1938 when Hitler's policies of persecution were well known, it was not a joking matter among civilized persons and I don't think it should be considered as such. In addition, you, yourself, heard Fritz von Opel talk about the two Jews in Hungary, he said, "Well, they were Jews, weren't they?" And Your Honor [4207] knows perfectly well that persons in ordinary speech don't talk of people whom they have any regard for in that sense.

Throughout, he shows the same policies, he has thrown his luck in with the Germans, there was no hostility between Fritz von Opel and the Germans, the only hostility was that he was afraid they might spoil the scheme his father and he had thought up to keep his property safely in Switzerland, and when they needed the Germans' help at the beginning of the war, they even enlisted the aid of the German government. So I say to Your Honor there is ample evidence in all of Fritz' activities, including his activities on behalf of Uebersee, to come to a well supported conclusion of enemy taint.

As I pointed out in my proposed findings, Your Honor, these general findings that I referred to this morning on Mr. von Bibra, on the various companies, on doing business, I think these things are relevant on all three contentions because they show Fritz was not an innocent stockholder, as the Supreme Court considered Kaufman, that he was acting on behalf of enemies and that he was enemy tainted.

Now, very briefly, Your Honor, I will talk about doing business, which I have partly discussed. I think I have covered the point of the pretrial order and also something of the merits. I would only like to discuss at this point one word about this residence. The statute does say that a person is doing business only if he is resident outside the [4208] United States. But the evidence is uncontradicted and uncontradictable that Fritz von Opel was here on a visitor's visa good for six months, which was extended for six months at a time until 1942, when he was interned.

Now, I think residence in Section 2(a) of the Trading with the Eenmy Act must have a meaning that is consistent within itself. The Supreme Court of the United States in Guessefeldt v. McGrath construed the term resident appearing in another part of the same sentence, referring to persons resident within Germany or within enemy territory, and it said resident means something more than mere physical presence and something less than domicile.

I think Fritz' stay in the United States is purely physical presence; even his counsel in his brief says it was a physical residence or he was resident here in a practical sense, whatever that is. But he certainly had no intention of staying here for any indefinite period, he couldn't have, his permitted stay was for six months at a time, and once the United States denied him a renewal, he had to leave, so that he had no assurance he could stay. And certainly, once he was interned, he was here involuntarily and the Supreme Court has directly held in Guessefeldt that a person who is involuntarily detained is not a resident.

Furthermore, never having acquired a visa to enter the United States for permanent residence, I don't see how he [4209] could become one in this court, notwithstanding his lack of permission to have it.

So I say to Your Honor that applying the principles set forth under this very section, Fritz von Opel cannot be deemed to be a resident of the United States. He was still resident in Switzerland and domiciled in Switzerland and, therefore, he could be subject to the doing business argument.

This argument you heard, that doing business was only intended to be applied to persons outside the United States because the sanctions of Section 3 are applicable to persons here, is an interesting theory which finds no support whatsoever in the legislative history. There is just nothing to that effect in it. The legislative history merely says we are going to penalize people who do business with the enemy and we don't care how much business it is. If it is the minutest portion of the total business they do, it still disqualifies them, we are not going to be kindly to people who trade with our enemies. So much for the doing business.

Now, Your Honor, I would like to turn to the two issues that relate to the property interests. The first is the interest of Fritz von Opel without regard, at the moment, for the division of interests. Counsel in his opening brief, and in the argument and in his supplemental brief, has asked this court to return the corpus of this property plus 20% of the income. At another point and in prior statements to Your [4210] Honor, counsel suggested that we might return everything except the usufruct, that the usufruct could be kept by the government, that we should be usufructuary and have Fritz as the legal owner, as if we were Wilhelm and Marta von Opel.

Addressing myself to that last one first, Your Honor, I say, firstly, that if that were the solution to this case, that could have been done long ago and this case need not have been remanded to this court. It didn't require Fritz von Opel's presence in the action as a party to reach such a decision. If the court of appeals or if the Supreme Court had thought that that was the way to dispose of this case, they could have ordered a return to Uebersee of everything except 80% of the income. In fact, Your Honor, I take the liberty of calling your attention to the fact that that precise argument was made by Uebersee to the Supreme Court. On page 25 of Uebersee's brief in the Supreme Court, it is stated:

> "But even if we assume that because of the usufruct in the Swiss shares there is an enemy interest in the American assets which can be confiscated here, certainly confiscation cannot go beyond that interest. The

> rights of the usufructuary are as separable from the right of the neutral owner of the Swiss shares as the rights of pledgee and pledgor. Confiscation of the usufructuary interest will remove all enemy [4211] rights and vest them in the custodian, there is no possible justification for going further."

That is from the petitioner's brief in the Supreme Court and, as Your Honor well knows from looking at the opinion, that contention was not adopted. We pointed out to the court in our reply the absurdity of that, of having a voice in the management with a Swiss corporation in Switzerland which, as Your Honor undoubtedly knows, does not recognize any vesting actions by the United States government; we would just have to "whistle for our rights" as they say in the vernacular. So I say to Your Honor that the courts have rejected that construction.

Furthermore, Your Honor, it is not a true interpretation of the situation here. Is Fritz von Opel's interest really an interest in everything except 80% of the income? I think the answer is clearly, "no." As far as 20% of the income goes, it has been held by the court of appeals that that is not an in rem right. That was not an off-hand comment by the court of appeals, that was an answer to Uebersee's petition for clarification of the opinion and the court of appeals said two things, it quoted the provision of the gift agreement and it said under this provision Fritz von Opel has merely a contract right against his parents. It even went further, it said:

> "Appellant's third request for clarification is really a request for modification and is premised upon [4212] Fritz von Opel's ownership of the 20% interest in the shares. Since we hold that he had no such owner-

> ship except the contractual rights to receive a portion of the dividends received by the enemy owners, we need not consider further this portion of the motion."

That appears at 196 F. 2d 560, and that, Your Honor, is in exact accord with what Uebersee itself represented, again in the Gold case. In that memorandum by John W. Davis, there is a footnote to the memorandum which says:

> "The 20% of dividends and interest granted Fritz von Opel out of the usufruct by the deed of gift is a grant out of the reserved estate, proceeds from the usufructuary, and does not give Fritz von Opel any part of the beneficial use and enjoyment."

Now, you heard both experts testify, Your Honor, that that was a matter of interpretation. What better interpretation can we give an instrument than what the parties themselves gave it? So, as to the 20% of the income, I think we have no problem.

Now, as to the corpus. I have said in my briefs and I urge it to Your Honor now, that what Fritz has is nothing more than an expectancy. Why do I say that? The answer is very simple. It is true that his father made an inter vivos transfer, but what did he transfer? He gave him a bare or, as the [4213] court of appeals chose to call it, sterile legal title with no part of the present beneficial enjoyment and it left in his father the right to do with the property as he pleased; yes, the right to dispose of it, as the Supreme Court said. He did dispose of a piece of it, when he sold an oil lease to pay a fine. He wanted to dispose of another piece of it when he wanted to sell the Spur shares to some third parties and they have done, who knows what, with the proceeds. Fritz had absolutely no assurance and no control over that corpus as long as his father and mother are alive, so that what he has is nothing more than what any prospective heir has. He has merely the right to sit and wait and be assured that some day he is going to get something, it might be five cents or it might be five million dollars, it is whatever his father chooses to leave him. I say to Your Honor that such an interest is not an independent interest which can be set aside and given to him, when that is not what he had during the lifetime of his parents.

Now, one last word about the German law on division of interests, Your Honor, and the findings submitted by counsel for intervener. On this division of interest, we introduced evidence not only of property tax law but evidence, I think more important, of the German enemy property law which says we look at the economic ownership. I say more important, Your Honor, because it is an exact analogy. We are dealing [4214] with enemy property law on both sides and here is the German law saying that we look at the economic realities of the situation. Now, it is true that nobody has produced any cases which say that you can involuntarily split a usufruct, no one contends that. We say, however, that if Your Honor construes the opinion of the Supreme Court to require a setting apart of one interest from the other and if Your Honor reaches this point, then it should be set apart one from the other on the basis of a realistic appraisal of economic ownership and not a technical appraisal of German civil code provisions.

For that reason, Your Honor, I do object to these general findings of German law which counsel has submitted because they just are completely immaterial to this matter. It is all very interesting as to what the German civil code provides, as I said on Friday, for a usufruct and what the theoretical rights may be. The question we are here to decide is not what a theoretical case is, but what this case is, and, under that test, we have to look at the real rights of the parties and not what the textbooks say they may have been.

So, Your Honor, I say that where you have proof through the German courts and the German statutes that it is economic or beneficial ownership that is to be considered, the same beneficial ownership that these people were talking about in the Gold case and where you have the court saying that in a case where you have a usufruct where the parents continued to [4215] control the entire proceeds, that that means that the parents are the beneficial owners. I think that is entitled to great consideration and that is exactly what the German court did in the decision which has been marked Defendant's Exhibit 153. The only distinction that I heard in this courtroom offered for that case is that it involved a vineyard instead of shares of stock; I fail to see that that makes any difference. It was a German court looking at a German usufruct.

I say to Your Honor also, in considering not only this last point but in considering this case as a whole, that there must be one thing very urgently kept in mind. Counsel has referred to these so-called comments of the Supreme Court, to these statements of what he called American law, but he has failed to refer to the fact of what the last paragraph of the Supreme Court opinion said. It said this case is remanded to the District Court for consideration in the light of Kaufman and this opinion of whatever rights Mr. von Opel may have.

Now, this opinion, meaning Mr. Justice Minton's opinion, I think sets forth those rights very comprehensively and it sets forth more comprehensively the rights of his parents. If you subtract what the court found and what this court has found from the rights accruing to the whole, I think the interest of Fritz von Opel would be zero and I think the judgment should be in favor of the defendant.

Thank you, Your Honor.

[4216] ARGUMENT ON BEHALF OF THE PLAINTIFF

By Mr. Arnold

Mr. Arnold: May it please the Court, I hear counsel's analysis of the issues here with some anxiety. You can't joke about a Jew. You must prove by your whole life that you are not an anti-Nazi. Your correspondence with your wife can be dug up.

Look at the situation I am in, Your Honor. My grandmother was a German, I had some German relatives who did march in Hitler's parade because they didn't have the courage not to. Since the war I have been sending these terrible people Care packages. I suceeded in getting, over the bitter opposition of the Alien Property Custodian, the German Embassy money back which they had confiscated. I am in an exceedingly vulnerable position if such character trials as this can be held; and so I imagine Mr. Baum might be, if he got in the hands of another extremist, Mr. McCarthy.

Now, those things, Your Honor, all I say is, have no place in an American courtroom. The only thread on which he hangs is Mr. Justice Black's referring to these stockholders as innocent stockholders. He opposes innocent to enemy and there is where he makes his final ruling, he says non-enemy stockholders have a severable right to get their property back. And Mr. Justice Reed meeting that issue and stating, as I said, a defensible proposition said, well, these people [4217] who invested will get all their property back, if they are not enemies. And I don't like it, and it is on that basis that he tries to say the Supreme Court has developed a character trial. And, of course, it is a character trial and nothing but a character trial. So I say that there isn't any room to get in between those two opinions such as he is trying to do, and I hope I have made myself clear. I will go on to the next point.

Your Honor's findings on the usufruct, I think, are final. Your Honor has so ruled, unless we can get an appellate court to reverse you, for the purpose of this case Your Honor's findings are final, and I don't think we will try, because I think Youor Honor's findings are satisfactory to us on that point.

Your Honor's findings are that there is an in rem interest here. You stated the German law, you have stated the German law correctly. Under those findings, we have a very substantial interest in this case, a very substantial and valuable property. It isn't like somebody hoping to get something from his father, we have the legal title and it cannot be transferred; there is no possible way under German law or Your Honor's findings to take this property away from us and we have legal and not equitable title.

Now, this cures us of the dicta of the court of appeals. They said we had bare legal title, and bare legal title—no, sterile legal title, sterile, I presume in the sense we weren't [4218] in control and that was all we had. For the purpose of control, which the court was considering, we will let that statement ride, but for the purpose of evaluating what we have under the return, under this new trial, it has nothing to do with the case. It is not res adjudicata because the parties are different. It is not a controlling principle of law, it is simply a statement of fact. It is a statement of fact which we have never had an opportunity to contest because it is one of these off-hand remarks made by an appellate court.

Counsel says that appellate courts never make ill-considered remarks and off-hand remarks. Well, I can tell Your Honor that I was once on the appellate court and I know one very distinguished justice who has read his opinions and wished he hadn't said a lot of things that are in those opinions.

Of course, I think it was not necessary for the opinion, they were talking about control and if, of course, counsel is right about that interpretation, Mr. Justice Minton never should have sent this case back. The cases were obviously very much discussed, the dissent is extremely vehement and this case was sent back and those dicta can't possibly control this case, they are in another case, and in spite of it, it was sent back to give Fritz von Opel the chance to show his non-enemy status before the court, and that is what the court says.

[4219] Now, I think that I could be helpful to this court, perhaps, if I put myself in your position. I don't think counsel is making their best argument for this case. If they have them, I have been expecting them to make them. I don't think that I would want to be the first judge to approve of a character trial on the off-hand chance that Mr. Justice Black, whom we all know doesn't like them, meant we should have them for that term "innocent." I think I should discard that, instantly.

Enemy taint of an individual of that character, I would certainly discard even if I entertained the notion of enemy taint of an individual, it could go no further than the trial of something he had done, not what he intended to do, not some letter, even if we take that letter at its face value, that I intend some day to bring this property back and let Germany have the use of it; I think if we know Fritz von Opel and you have seen him on the stand, that is the very, very last thing he is ever going to do with this property.

But even assuming he had such eleemosynary intentions to aid Germany, you do not punish, in our courts, a man for what they intend to do. So that I would certainly say, if I even thought the word innocent had a broader meaning than non-enemy, I would discard it from the case because he didn't do anything and he is not going to be punished by these little pieces of mud that are being thrown at him because of his [4220] opinions and associations.

As I would summarize the evidence, the question is whether Fritz von Opel liked his father better than he did the Jews. Now, that seems to me the final issue here. We have heard this testimony about his nostalgic home and he wanted to be a big man and the suggestion he wanted to be a big man and would give this property to Germany. Well, he didn't do any of that. So, if innocent does have a broader meaning than non-enemy it certainly can't refer to a man's character, so I think that is out.

The thing that I expected them to say was this, there could be a difference drawn without a character trial and I think we should face this argument, I will have to make it myself as counsel hasn't done it.

You could, without a character trial, make a difference between a majority stockholder who theoretically at least can vote the shares, and I think Fritz could, at least under one of these theories, who can vote the shares and a minority stockholder who can't. Kaufman was a minority stockholder and so we say the court might be troubled as to whether he should not make a difference between a majority stockholder and a minority stockholder.

Well, there are two answers; one is that this wasn't a controlling stockholder under the court's own definition; Frankenberg, for the father, was in control. We don't accept that as a fact, but [4221] we must accept it—we don't accept it inside, but we must accept it as you do any decision against us. Or, if we forget that and say, well, he was a majority stockholder, he did have control, then why did the court send it back to determine his non-enemy status? His majority of stock was clearly evident on that Supreme Court record. There was a long discussion, there must have been in the court, I think we can see or must assume that every facet of this case was explored. So that had the court had that in mind, making a distinction between a majority and a minority stockholder, that case would have stayed right there, the judgment would have been affirmed, the distinction between that case and Kaufman would have been made, and the fact that the Supreme Court sent it back seems to me to be almost conclusive that there is no such distinction.

So if we accept that Kaufman case and the other case, we come to this conclusion that only if a man is going to be deprived of his property for thoughts and attitudes, only under those circumstances, can this court decide against us. The property has value, there isn't any question about it. Their own testimony showed that there wasn't any way—their own witness testified that under the operation of German law, Fritz von Opel would get this property back, not by an expectancy, not five cents or ten cents, that was not the testimony of their own witness; it was under operation of German law and it was impossible to say that such an interest, the [4222] value of such an interest can't be computed by simple actuarial tables.

Counsel's questions are most ingenious, if under German law there was a usufruct, it doesn't have any value, and she said no; it doesn't have any value if its terms are so broad it doesn't have any value, citing a case where usufruct didn't have any value, but we asked a question about this case, of course, she was compelled to say that there was a very valuable right, the legal title plus the absolute right to have it on the death of an 83 year old woman.

So, Your Honor, I think the only thing that has troubled me about the case, I suppose, is the difference between majority and minority stockholders. I don't think counsel would dare argue that because he wants—he doesn't want to make that, let Mr. Kaufman have his property back and he isn't going to let anybody have their property back, so I suppose we will hear him violently attack that theory.

It seems to me the only one you could decide this thing on, and that is in complete contradiction to the fact that knowing, with a divided court, and knowing that we were the sole stockholder except for qualifying shares, they said go back to the court, the District Court, and determine his non-enemy status. That, Your Honor, we have done and we have, therefore, proved our case.

Now, Mr. Ennis is going to take up the facts, the general [4223] view of the facts and I think this question on the national.

ARGUMENT ON BEHALF OF THE PLAINTIFFS

By Mr. Ennis

Mr. Ennis: I have very little more to say. Your Honor has been so patient and the argument has taken such a wide range, that I will make a few comments only on points which I think may not be completely covered by the argument and briefs Your Honor has listened to already so patiently.

I must say in all frankness to Your Honor, I think the problem that faces you is as to whether you are going to decide—apart from Fritz von Opel's eligibility, Your Honor faces the problem of deciding what his interest is in this property under German law, as it has been testified as a matter of fact, or of deciding on the basis of the court of appeals opinion and the Supreme Court opinion, some language in it, that his parents had a great deal more than a usufruct and that the appellate courts have already decided that Fritz von Opel does not have the rights of an owner under the German law.

Now, if I were going to decide the case, Your Honor, I would feel that I had to face up to that problem right away. Either you are going to decide his interest is under German law and make findings on it regardless of what you do about him, or you are going to say that somehow that matter has already been decided by expressions of opinion in the appellate [4224] courts.

Now, I am not going to elaborate on that any further except to make this distinction for Your Honor. If I were deciding the case, I would have quite a different approach to the corpus and the 20% of the income, for this reason, Your Honor. There are three opinions that have been expressed as to Fritz' interest under German law in 20% of the income. Dr. Schoch has stated for the government that she would read the gift agreement and, even if she looked at the draft of the gift agreement, she would conclude as a matter of German law that Fritz von Opel did not have a direct right to 20% of the income but only a contract right against his parents which he cannot assert against our government but only against his mother in Germany.

Dr. Kronstein took a middle position, he said very frankly it was a matter of how you interpret the agreement and he did not offer either an interpretation in conformity with Dr. Schoch's or the opposite interpretation for which we contended, that the parents only intended to retain 80% and Fritz had a 20% claim not against them but against the property.

The third opinion was the one that our German expert testified to, former Chief Judge of the High Court in Munich, which is a deposition in the case, you did not have the opportunity to hear that witness directly but he testified that the way he interpreted the document, Fritz' interest was [4225] a direct one.

Now, if I was in Your Honor's position and had to choose between those three positions and since I didn't have any, in a sense, prevailing evidence of German law on the point but was more or less assured by all of the experts that it was a question of interpretation of the contract, I would certainly be influenced by the strong language in the court of appeals in their clarifying opinion that the way they read it was that his 20% interest to the income was only against the parents and not against the property.

I think Your Honor, as a matter of your own judicial power, has the responsibility to make an independent judgment of that and you certainly will consider what the court of appeals has said.

I make a great distinction, Your Honor, in respect of the income simply because it is left to a construction of the document, and the corpus. I asked Your Honor to consider that the court of appeals said nothing about the interest of Fritz von Opel in the corpus of this property, nor did the Supreme Court.

Now, Your Honor, when the counsel in the first trial, and your own memory of that will be much better than mine because I was not here, in the colloquy about the findings, the question arose as to whether Your Honor was going to rely upon a factual control, which might or might not be cut off [4226] by America's entry into the war, and Your Honor knows those agency cases, whether agency is cut off by a beginning of a war and Your Honor said no. You said the control that I am concerned with is the control which the usufructuary has by virtue of his usufruct, that his co-possession gives him control, and you said that is the control that the Opel parents have.

Now, I am going to leave this question, Your Honor, with merely the statement that as to the corpus of this property, Fritz von Opel's rights under the German law should be found by Your Honor. I think that the appellate courts did not attempt to determine those rights, but in any event, even if Your Honor disagrees with me, I submit, Your Honor, that the intervener is entitled to a determination of what his rights are under German law because, to repeat what I said Friday, the government has relied very strongly on the German law to establish this enemy usufructuary interest, but now they would not rely upon the German law at all in considering the legal owner's interest although the German law expounds very carefully what that interest is. I leave it to Your Honor to determine whether we are not entitled to findings under the evidence as to what his rights are under German law, even if you decide, for reasons of American law, that he is not eligible to recover that interest.

Now, the other point I want to make, Your Honor, is that [4227] Mr. Baum has talked a good bit of concealment. Now, there are plain cases of concealment in the reported cases, the Standard Oil case in 163 Fed. 2d, the Beck case in 182 Fed. 2d, but in those cases, Your Honor, either immediately before the outbreak of war in Europe or thereafter, there was a transfer of an interest from a German with a concealed option back, or something of that kind.

Now, what is the concealment here? Whatever rights Fritz von Opel has were obtained in 1931, whatever rights his parents have were established in 1935 when the usufruct in rem was set up. The concealment is the letters, the exchange of letters with von Bibra—where is the concealment in the letters? Fritz writes to von Bibra, I feel that I have got to protect this property for the German Reich. I have got to protect it for the employees in America. That is what he says in the letter and his letter to Mr. Guyette which Mr. Baum quoted from this morning, in November 1939 says the same thing, that I have got to do something to protect these jobs.

Now, whether that is true or not, Your Honor, those letters do not involve any concealment. They may be interpreted as involving statements which were or were not true. Mr. von Bibra said Mr. von Opel didn't say to me he was saving the property for the German Reich, he said he was saving it for himself. Mr. von Opel didn't say to me that he would do [4228] anything for Germany, I interpreted what he said as a rich person in Switzerland who would give some money. I said, "Did he give money to the party?" "No." "Did he give money to the Rowing Club?" "Yes, 900 Swiss francs."

Now, Mr. Baum said, however, Fritz suggested to Mr. von Bibra there was a Swiss banker who might give foreign exchange to Germany. Well, now, Your Honor will read those two documents together, one of them is a secret telegram of September 1 from Berlin to the legation. Surely, Fritz von Opel didn't know about that. But then three days later, on September 4, Mr. von Bibra writes a memorandum for the files, Fritz von Opel informed me—the verb is "informed"—Fritz von Opel informed me this banker might be a source of money pursuant to the telegram of September 1. How did Fritz know about the telegram of September 1? It is perfectly obvious. He went in to see von Bibra to get a favor from him and von Bibra said, by the way, can you suggest anybody who might help us on foreign exchange and Fritz mentioned the name of a Swiss banker. Now, that is all there is to that.

Now, a great thing has been made about Fritz didn't volunteer these letters. Well, the evidence is clear he didn't have the letters. Mrs. von Opel had the letters and chose to keep them for her own purposes and chose to produce them at a time which, to understate it, was certainly embarrassing. But we did produce the letters, Fritz produced them, his lawyers produced them when he got them. He wasn't questioned [4229] when he was interned as to whether he had such correspondence. Mr. Baum hasn't said to you that Opel ever denied such a correspondence or, when he spoke to Mr. Baum and his associate, denied the correspondence. He said "they didn't come forward and volunteer there had been such correspondence."

Well, Your Honor, that would put a pretty high sense of obligation on a private litigant with the government to come forward, to find correspondence he didn't have and come forward and produce it. We produced it when we got it. You can't take his property away for that, Your Honor.

Now, a great point was made about Fritz wrote a letter to his own father setting out about the shipping shares.

Remember, Your Honor, that Fritz von Opel had Deku sign that letter also, because he said he wanted to get the representations as to the deal being supported by the German government, he wanted Deku on the record and he writes a letter to his father and says to his father's partner, is this true, if it is, sign it, and he signed it. You are not going to be able to make anything out of that kind of a transaction.

I thought yesterday that I had run through the gamut of the government's positions when I said, first, in the Gold case they said Fritz is the owner, then in the first trial they said that we don't have to worry about Fritz, it is a usufruct and that is enough to prevent Uebersee from recovering anything. Then here they said during the trial that Fritz had nothing of any value. But this morning we have a [4230] fourth position, Mr. Baum said he has some kind of a testamentary interest.

Well, now, Your Honor will have to decide whether you are going to determine Fritz' interest under the German code or whether you are going to determine it on the basis of these arguments. I hope Your Honor will have another chance to look at the record in the Gold case, which is Defendant's Exhibit 8 in this record. It is perfectly clear that Mr. Davis and Mr. Kresel made the argument, the memorandum is in the record, that they were trying to get in within the Attorney General's definition of owner and they were trying to cut down in their legal argument what Fritz' legal rights are.

But Your Honor, when the case finally comes before you, where the property interests are to be determined under German law which Your Honor has held to be applicable, and not under the contentions of counsel for other purposes, are we really going to decide what Fritz' interest is in this property on the basis of what some lawyers put in a memorandum in 1935? You look at Dr. Wronker-Flatow's affidavit, you see if there is any attempt there to say that Fritz von Opel under the provisions of the German civil code does not have the rights of an owner in that property. I will leave that to Your Honor.

Now, on the bauxite business, I just recall to Your Honor that Fritz von Opel on the stand was asked by me on redirect examination, "Did you have any business in Hungary except the [4231] business of Transdanubia which was wholly owned by Uebersee?" and he said, "No."

Now, Mr. Baum says that, well, he gave powers to these two Hungarians to sign his name for Transdanubia. The powers of attorney are not produced, but the defendant's exhibits, particularly 127 in evidence has a letter from the Hungarian to Fritz saying we want these powers to sign for Transdanubia. Now, Your Honor has held Transdanubia was not doing business in Hungary. Are we going to say that Fritz von Opel, whose uncontradicted testimony is the only business in Hungary was Transdanubia, somehow he was doing business in Hungary because he gave a power of attorney to somebody to sign for him for Transdanubia? I don't think so, Your Honor.

I might say that many of our findings, Your Honor will find, are not in disagreement. Mr. Baum and I have both submitted findings that Fritz von Opel was very active in Germany about his father's affairs until he came to this country in 1940. Our only difference on those findings is that Mr. Baum has put in his proposed findings that he was conducting this business until war began with the United States. Well, now, Your Honor, the evidence won't support the clause "until war began with the United States." His testimony is that he was not a director of Collet &

Engelhard after 1940. His testimony is that when he came to the United States, he was not conducting business in Germany; and we cannot bring his [4232] activities before the war in Germany, on behalf of his father, up to the outbreak of the war.

Now, of course, the fact that he was very busy about his father's affairs in Germany, we did not rely on Mr. Baum to produce it, we produced it, he testified on direct as well as on cross. If his property is to be confiscated because he took care of his father's affairs before the war in Germany, well, if that is the policy of our law, then his property must be confiscated. We find no authority for such a contention.

I have nothing more to say.

The Court: Mr. Ennis, let me ask you a question, I probably ought to know the answer, but I don't. You seem to indicate that or concede that if Fritz von Opel's rights under the usufructuary agreement existed in 20% of the income, that that constituted nothing but a claim against his parents. I gather from you that you concede if that were the sole interest, why, he couldn't recover it?

Mr. Ennis: If that were his sole interest, no.

The Court: Do you concede that? I mean I have been wondering why, Mr. Baum argued that and you concede it, apparently.

Mr. Ennis: I would say this, YourHonor: If Your Honor finds under German law Fritz von Opel's sole interest in the shares of Uebersee or the vested property is a contract claim [4233] against his parents for 20% of the income, that he could not recover anything here.

The Court: In other words, the Trading with the Enemy Act doesn't recognize a valid chose in action, is that it?

Mr. Ennis: Your Honor, the law is this, the Trading with the Enemy Act, I think, on this point is quite clear, that if the government vests the property in the United States of a German, people may have claims against the German, but under our law the only people who can satisfy their claims against the vested property are American citizens or residents of the United States. What our law says and what I think our law says to Fritz von Opel, if you have a claim against your parents and we have property of your parents, you must satisfy yourself out of their assets elsewhere because vested property is reserved for the claim of American citizens and American residents, and when their claims are satisfied, we kept the rest.

The Court: I see. Now, there is one other question. Your testimony as to German law relates to provisions of the German civil code and then you did have these cases under the tax law and I know the other side did, also. Did you have, from your point of view or from any of your experts, I have heard you read the testimony of the expert in Germany but I didn't have my thoughts directed to the point as much as I do now, did any of your experts deal with the proposition [4234] as to what would be the nature of the holding or the approach to the holding, granting the usual usufruct under the German civil code but granting also what was found by me in the earlier trial, the control of his father at least to the extent of possession through his agent Frankenberg and, as I remember, control to the extent of being able to sell some of it to pay his fine, and so forth and so on. Did you deal with that in your testimony at all?

Mr. Ennis: No, I think not, Your Honor. I think our testimony on the value of the owner's interest in the usufruct is limited entirely to Dr. Kronstein's testimony and you will find there that he testifies as to only two things, the value of the owner of a regular usufruct, and he said that in this case dealing with this gift agreement, we were dealing with a regular usufruct.

The Court: Did you speak about that case that Mr. Baum had of a vineyard?

Mr. Ennis: Oh, yes.

The Court: Did he testify about that? I have forgotten.

Mr. Ennis: Oh, yes, he took the stand on rebuttal testimony and discussed that at some length, Your Honor.

The Court: I will have to reread that.

Mr. Ennis: Our difference there, Your Honor, if I may be of help to you, is that we argue that what Your Honor found is that this usufruct was a regular usufruct under the German [4235] civil code and that is what our experts say, and then he testifies as to the value of the owner's interest.

Now, Mr. Baum argues, of course, as you know, that it was a regular usufruct plus what he called at times this right of disposal. Now, Your Honor, we say that all the rights that Wilhelm von Opel exercised by virtue of his co-possession were rights within the ambit of an ordinary usufructuary. Mr. Baum says no, it a great deal more than that and that, of course, is what makes the difficulty for Your Honor in determining the interests.

The Court: I understand. All right.

Mr. Ennis: Thank you very much.

Mr. Baum: Just one moment, Your Honor.

(Mr. Baum conferred with Mr. Ennis.)

Mr. Ennis: Oh, yes. Your Honor, we have agreed in the interests of simplicity to rely upon the English translation, one English translation of the two that were offered in evidence of the provisions of the German civil code on usufruct, so with Your Honor's permission and by agreement of counsel, I will withdraw Plaintiff Intervener's Exhibit 17, the Loewy translation, and rely upon the Wang translation. There is no mystery about this, Your Honor, we thought we would put our experts only to the burden of checking one rather than two translations. There is no substantial difference between them.

[4236] The Court: All right. I will try to study this out.

Mr. Baum: Thank you very much, Your Honor.

(Thereupon, the procedings were concluded at 3:05 p. m.)

Argument on Behalf of [illegible]

[illegible] of the proponents' [illegible] on the tion, go with the [illegible] or as used, I will [illegible] and 6, the Lacey translation, [illegible] translation. There is probably [illegible] Honor, we thought we would put our [illegible] of adopting one rather than [illegible] translations. There is no substantial difference between them.

[3286] The Court: [illegible] the one?

Mr. [illegible]: Thank you very much, Your Honor.

(Thereupon the proceedings were concluded [illegible].)

Intervener's Exhibit 1

In the Matter of
Fritz von Opel
and
Margot von Opel

State of New York,
County of New York, *ss.*:

Erwin G. Schattmann, being duly sworn, deposes and says:

That he was born in Magdeburg, Germany, and that he emigrated to this Country on October 21st, 1937. That he immediately signified his intention of becoming a citizen of the United States by obtaining his first papers, and that he will be eligible to make application for his citizenship papers in October, 1942.

Deponent is President of the Westminster Industrial Corporation, a New York corporation, which was incorporated on November 18th, 1938, and he has been President of said corporation from the date of its organization. Deponent is also President of the Ergo Machine Works, Inc., a New Jersey corporation which is wholly owned by the Westminster Industrial Corporation. Both the Westminster Industrial Corporation and the Ergo Machine Works, Inc. are wholly owned by the Uebersee Finance Corporation, a Swiss corporation.

Deponent has known Mr. Fritz von Opel for approximately four years. He has met him socially and also in connection with the business conducted by deponent. In this connection, it may be stated that prior to June 20th, 1941 Mr. von Opel advised deponent as President of the Westminster Industrial Corporation to obtain the American manufacturing rights to a certain hot-pressing process the patent on which was owned by a citizen of Poland. This process would enable the manufacturer to produce parts from non-ferrous metals in a simplified manner with a great saving in the waste usually occurring in producing said parts by other processes. Such process would also enable the manufacturer to produce the parts with a great saving in time and machine hours.

In order to use the hot-pressing process it was necessary to build a machine, and it was only possible to build such a machine by obtaining a priority rating from the O.P.M. Mr. von Opel initiated our application for a priority rating by writing to the O.P.M. in New York, in which letter he explained who he was and directed that any inquiries about him could be made to Mr. William Knudsen. Subsequently, as a result of said letter, Mr. William D. L. Starbuck of the New York office of the O.P.M. contacted deponent, and after numerous conferences in New York in which Mr. von Opel participated, and other conferences in the Washington office of the O.P.M., Westminster Industrial Corporation obtained an A-2 priority rating for all the equipment necessary for the use of the process.

After Westminster Industrial Corporation obtained its equipment, Mr. von Opel advised the engineers of Westminster with regard to the construction of the machinery and with regard to the mechanical set-up of the process. Mr. von Opel's advice in this connection cannot be too highly praised. He has received no remuneration for his advice, but the result has been of incalculable benefit to the corporation. Only today the machinery is to start in operation for the first time and in this initial period Mr. von Opel could be of great aid to the corporation in advising the engineers with regard to the operation of the plant and such improvements as may be found to be necessary.

In connection with the Ergo Machine Works, Inc., Mr. von Opel has also given it the benefit of his advice. When Ergo was purchased by Westminster Industrial Corporation in Jan. of 1941, it was practically a defunct corporation. Mr. von Opel advised the corporation what to do to put it on a paying basis. He advised it how to re-align the entire set-up, what additional machinery should be purchased, what line of work it should do. As a result of all this, Ergo is now on its feet, it employs between thirty-five and forty men, and at the present time its entire capacity is used for defense work in machining parts. Ergo Machine Works, Inc. has cooperated with Mr. von Opel, who has been attempting to perfect several inventions which he hopes will be of use to this Country in its defense program.

As to Mr. von Opel personally, deponent has never heard him utter a single word against the Government of the United States. In fact, the contrary is true. On numerous occasions he has urged deponent in his capacity as President of the Westminster Industrial Corporation and the Ergo Machine Works, Inc. to devote as much of the time and energies of the two corporations as would be humanly possible to such work as might be helpful to the United States in its present emergency.

Mr. von Opel, on several occasions informed deponent that he wished to emigrate to the United States, but that he was fearful of leaving the Country because of the possibility that he might be unable to re-enter.

Intervener's Exhibit 1

Deponent has never heard Mr. von Opel utter one word in favor of Germany, and of its allies, or the totalitarian form of government. On the contrary, deponent has heard Mr. von Opel express himself very strongly against the enemies of this Country, and he has stated to deponent that he regrets that his father is still in Germany as that will not permit him to make public utterances against Germany since anything said by him would probably result in suffering by his father.

Deponent asked Mr. von Opel why he left Switzerland and came to this Country, to which Mr. von Opel replied that he was afraid to remain in Switzerland because of the possibility that Switzerland might be invaded by Germany and he said that if Switzerland was invaded he would be the first one to be shot because of his known feeling against the Nazis.

Mr. von Opel has stated to deponent that he desires to conduct himself in this Country in a manner that would cause no one to have any apprehension of the fact that he might be a Nazi sympathizer. Thus, Mr. von Opel has stated that he would not do anything or go to any place that might lay him open to suspicion. For that reason he spent his summers on the Island of Nantucket, his winters in Palm Beach where he thought he would be remote from places engaged in defense activities. The people with whom he traveled were either refugees or persons unsympathetic to the Nazis.

On many occasions, both prior to our entry into the war and subsequent thereto, and particularly on an occasion when the newspapers reported that American engineers had examined some German planes and had found them to be of excellent construction and material, deponent heard Mr. von Opel state that this Country must exert itself to

Intervener's Exhibit 1

greater and greater efforts. He felt that there was a tendency in this Country to underestimate Germany's industrial strength, and he stated that it would require a supreme effort on the part of this Country and that each person here must do his part, in order that there should be no doubt as to the ultimate victory of the United Nations.

Deponent is also personally acquainted with Mrs. Margot von Opel. He has heard her make statements against the German form of government and against Germany itself which were as strong as any that could be made. She has repeatedly remarked how fortunate she and her husband were to be in the United States, that she was so glad to have received her first papers and would be thrilled when the day arrived that she would be a full-fledged citizen of this Country.

Deponent knows of his own knowledge that both Mr. and Mrs. von Opel have given both their time and resources to help immigrants who arrived in this Country as a result of the Nazi oppression.

/s/ Erwin G. Schattmann

Sworn to before me this :
:
2nd day of March, 1942 :

Intervener's Exhibit 1

June 23, 1941.

Mr. W. O. Crabtree
Regional District Manager
of the Defense Contract Service
of the Office of Production Management
33 Liberty Street
New York, N. Y.

Dear Mr. Crabtree:

I am the former general manager of the Adam Opel A. G., the biggest European Automobile Company which was sold by my family to General Motors in 1929.

I am very well known by Bill Knudsen, since that time, under whose guidance I had the pleasure of studying American manufacturing methods all through 1931. As I did not see fit to return to Germany, I engaged myself in this country in various enterprises, especially the oil and brewing industry.

A year ago, I acquired a machine shop, the Ergo Machine Works, Inc., Dunellen, New Jersey, for the purpose of experimenting with some new manufacturing methods. During the period of these studies, I found, with my associates, a new method of forging non-ferrous metals which seems highly competitive in quality, price and speed of production and which on top is bound to save many machine hours in finishing.

To prove the merits of this new method, I need a percussion press, of about 200 to 500 tons (preferably 350 tons) but so far, I have been unable to find one in the market. As I feel that there is a fair chance that this new method will become of extreme importance to the defense industry,

Intervener's Exhibit 1

I take the liberty of addressing you, personally, in this matter and I would appreciate it very much if your office would be kind enough in helping me find the needed percussion press.

Four weeks after this machine is delivered and we find the pilot plant is operating successfully, I shall be pleased to advise you accordingly, so that you may have an opportunity to see for yourself whether or not we've got something.

Very truly yours,

Fritz von Opel

FvO:BJ

Intervener's Exhibit 1

COPY

OFFICE OF PRODUCTION MANAGEMENT

Defense Contract Service
Second Federal Reserve District
33 Liberty Street
New York City

W. O. Crabtree
District Manager

June 27, 1941.

Mr. Fritz von Opel,
Westminster Industrial Corporation
International Bldg.,
630 Fifth Avenue
New York, N. Y.

Dear Sir:

In answer to your letter of June 23 regarding a percussion press, I am turning this over to our Engineering Department with the request that they see what they can do for you. As soon as I have work for you, I will let you know.

Very truly yours,

W. O. Crabtree
District Manager.

(see note attached)

Intervener's Exhibit 2

CGM:vg

BRANCH OFFICE MID
P. O. Box 272
Miami (2) Florida

10 January 1944

Subject: Fritz von Opel

To: Director, Security & Intelligence Division, Hq., Fourth Service Command, Atlanta (3), Georgia.

Recently, Mr. Fritz von Opel, interned alien enemy, has been transferred from Miami, Florida, to Algiers Camp, near New Orleans, Louisiana. I am not able to determine whether this camp is in your Service Command, or in the Eighth Service Command. If it happens to be in the other one, will you kindly forward this information to the proper place.

Mr. von Opel is a keen engineer — former purchasing agent and part-owner of the Opel Car works, in Frankfort, Germany. He has given us upwards of fifty excellent reports on German situation and German conditions. He is the only man known to have driven an automobile by rocket propulsion, and to have flown an airplane by rocket propulsion, prior to the war. Many reports from him, on this subject have been furnished to MID. He continues to be an excellent source of information on Germany. Should you desire to contact him, you will find that he will be cooperative.

Charles G. Mettler
Colonel, Ord. Dept.
Chief

cc to
Chief, Dom. Br., CU, MID, WD, Wash. DC as Information

Intervener's Exhibit 3

Telegram from Wilhelm von Opel to Fritz von Opel. Printed herein at p. 201a.

Intervener's Exhibit 4

Telegram from Wilhelm von Opel to Fritz von Opel. Printed herein at p. 202a.

Intervener's Exhibit 5

Letter from Marta von Opel to Fritz von Opel. Printed herein at p. 203a.

Intervener's Exhibit 6

Present address: Dolder Grand Hotel
Zurich, October 24, 1939

Hon. Baron von Bibra
Counselor of Legation
German Legation
Berne

Dear Baron von Bibra:

May I take the occasion of my wife's presence in Berne to put before you a matter which has been on my mind since the outbreak of the war and which is in every respect of decisive importance to me.

At the end of 1929, in other words exactly 10 years ago, shortly after the sale of our plant to General Motors, I left Germany and subsequently I worked in the American and overseas factories of that company for about 2 years. But soon I had to admit to myself that I would not find within that giant enterprise an activity which would give me the independence and responsibility which I wished to have and to which I had been accustomed. I therefore relinquished my connection with General Motors and furthermore sold a block of General Motors shares which I had acquired from the sale of Opel shares.

In the spring of 1932, I began to organize and/or acquire a whole series of my own American companies, especially a brewery, several oil fields, refineries, and a gasoline distributing company. All these companies have developed successfully after all kinds of struggles and difficulties and are about to grow slowly into the framework which had been visualized on a large scale from the beginning. My

Intervener's Exhibit 6

non-American investments are unimportant: beside some bauxite mines in Hungary, they consist mainly of a coconut plantation in the former German East Africa, which I acquired about 6 years ago in cooperation with the German Foreign Office which at that time was interested in German investments and in the settlement of Germans in the mandated territory.

After having succeeded in financing my oil refineries which had become insolvent because of years of price wars, in the summer of this year it looked as if all business worries had been reduced to a normal degree, and I, as well as my colleagues, had the impression that we could calmly anticipate a period of consolidation for all companies.

The English declaration of war has unfortunately brought these hopes to an abrupt end. The danger of seizure of German assets through the possible entry of the U. S. A. into the war has become imminent, and in fact, my African plantation has already been seized by the British authorities and my German manager of the plantation has been arrested.

While I hope to be able to obtain a release from the *British* authorities (by reason of the fact that the plantation is owned by a Swiss corporation with exclusively Swiss stockholders) my lawyers are unanimously of the opinion that the safeguarding and cloaking measures taken will certainly not hold up for any length of time vis-a-vis the very thoroughly informed *American* authorities and that a seizure can be avoided only by my taking timely precautions which would permit me to acquire a neutral citizenship in an emergency.

Intervener's Exhibit 6

In explanation I would like to note the following: although—as mentioned previously—I have been active in business in America for 10 years and could have been an American citizen for the past half decade, it has gone against my grain for various reasons to relinquish my German citizenship which to me is the tangible expression of my ties to my homeland. Of course, I had never anticipated the possibility of a new war and the entry of America into an alliance against Germany, which under present conditions would mean not only my being excluded from all my companies but also in all probability would endanger the existence of several thousand persons who are employed in these companies. Under these circumstances I have considered it my duty to seek a way which would make it possible for me—but only in case an emergency should arise—to change my citizenship temporarily and I would have the prospect of obtaining a kind of option for a neutral citizenship, a right which in practical effect is comparable to the option right held by Germans born in England or immigrants in the U. S. A. (after the expiration of the 5 year period).

Let us assume now that I were compelled to exercise this option, then I would automatically lose my German citizenship under present law. I have therefore instructed my lawyer in Berlin to make inquiries of the proper authority, namely, the chief of the division for citizenship matters in the German Ministry of the Interior, as to whether the Ministry is in a position to give me binding assurance regarding my re-naturalization after the expiration of such an emergency. Unfortunately, the Ministry cannot issue such a declaration, but in the opinion of the Counselor of the Ministry whose opinion was sought a subsequent re-naturalization would be considerably facilitated if the competent diplomatic representation in the appropriate country—meaning in my case the German Legation in Berne—is informed of the reasons for the renunciation of citizenship, if that should happen, preferably with the additional information that due to my physical injury military service on my part would be doubtful in any event.

In his report my lawyer mentioned a series of additional general considerations, in particular that it would in no way be in the interest of the Reich recklessly to endanger valuable foreign holdings, all the more so since the Reich would have the burden of paying compensation while the enemy power would have the benefits of the seizure.

As previously stated, I have no intention of acquiring a foreign citizenship unless and until compelling circumstances have arisen. Nevertheless the reason for this letter is that I do not wish to take even preparatory steps designed to secure to me a contingent option right until I have given the proper information in advance to the Legation.

I therefore would very much appreciate if you would let me know whether and in what particulars, if any, you deem it necessary for me to supplement the above statements. I most certainly will not hesitate to inform you with regard to all economic aspects involved, especially since the competent German authorities, particularly the Reichsbank, are already informed to a large extent regarding the nature and scope of my investments.

For reasons which my wife will explain to you I have not yet been able to take the trip to America which has

Intervener's Exhibit 6

been urgent for weeks. I can only say, thank God, for as I have heard from the travel agency a number of Germans were arrested on the Conte di Savoia but so far nothing is known as to the reasons for the selection of particular individuals.

With many thanks in advance for your kind efforts, I remain with best personal regards and the German greeting

Sincerely yours,

Intervener's Exhibit 7

(Seal)
GERMAN LEGATION

Berne, November 20, 1939

Mr. Fritz von Opel
Zurich
Dolder Grand Hotel

Dear Mr. von Opel!

Please forgive me for not having replied earlier in writing either to your letter of October 24th or the letter of November 10th. Since, however, you came here shortly after I received your letter of the 24th, I believed that I could discuss the matter with you personally. Your letter of the 10th of this month prompts me to discuss briefly the subject of our conversation.

First of all I would like to inform you that I have ascertained from the documents which you have submitted to me that you had the question examined in Germany under what conditions you may temporarily assume a third citizenship in order to preserve the substantial assets in the United States in the German interest. On this occasion it was suggested to you from the German side, as is evident from the letter of September 12th from Berlin which you have shown to me, that you pay one million Reichsmarks in foreign exchange in order to obtain a release from German citizenship. It cannot therefore be said that you yourself made such an offer in order to be released from German citizenship.

Dual citizenship of Germany and Switzerland is still possible today. Such dual citizenship however involves the risk

Intervener's Exhibit 7

that the United States will not recognize the newly acquired citizenship and will refer to the German citizenship. For this reason, it would actually seem to be advisable in your special case to relinquish German citizenship entirely. Since you have unequivocally declared that you will relinquish German citizenship only for the purpose of preserving for the German Reich your substantial assets in the event that America enters the war, and since moreover you have reported here immediately after the outbreak of the war and have offered your services for any activity of whatever kind, there should in our opinion be no difficulties in reinstating you in your German citizenship after the termination of the war. A notation to that effect concerning this matter is in the files of the Legation.

May I take this opportunity to thank you for intervening so quickly and successfully in the interests of the German Sports Club in Zurich.

I am sorry that you had to wait so long for a reply but I felt that, considering the importance of this question, I should reply only after the matter had been checked carefully.

Hoping to see you again in the near future and with best regards to your wife, and Heil Hitler!

Yours

/s/ von Bibra

Intervener's Exhibit 9

Safe Deposit Box 1923

Schweizerische Kreditanstalt Zürich

Agreement about the lease of a safe deposit box

Based upon the regulations stated below of which the undersigned took notice, Mr. Fritz von Opel, Steubenstrasse 34, Wiesbaden, leases from the Schweizerische Kreditanstalt the safe deposit box No. 1923 of its safe beginning today until April 2nd, 1933, i.e. for 12 months, for a fee of Fr. 33.—.

The undersigned acknowledges that he has received from the Schweizerische Kreditanstalt two keys fitting the leased deposit box and that he is obliged promptly to return these as well as the card of identification to the Schweizerische Kreditanstalt after the expiration of the lease.

Done in duplicate in Zürich April 2nd 1932.

The lessor:	The leassee:
Schweizerische Kreditanstalt (two signatures illegible)	Fritz von Opel

Regulation

for the lease of safe deposit boxes in the steel safe of the Schweizerische Kreditanstalt.

1) The Schweizerische Kreditanstalt uses all care for the safeguarding and safekeeping as well as for the locking of the steel safe and it is liable for all damage which might result from not employing this care.

Intervener's Exhibit 9

2) The lease of the boxes can take place for shorter or longer periods. The lease agreement is regarded as tacidly expanded for the period as covered by the present lease if it is not cancelled by one party in writing before the expiration. However, the Kreditanstalt retains the right without giving reasons to deny applications for leases and to terminate existing leases at any time. In the latter case it is obliged to refund that portion of the fee for that time of the lease during which the leassee cannot use the box any more.

3) The deposit boxes are to be used only for the storing of documents, securities and finished and unfinished precious metals and jewellery. For the storing of other objects the express consent of the Kreditanstalt is required.

   The leassee who counteracts these regulations is liable for all damage which might be caused thereby.

4) The assignment of the lease or a sub-lease is not permitted.

5) The fees for the lease of boxes set by the Kreditanstalt are as a rule to be paid in advance.

6) The locks of the boxes are all different among themselves. Only two keys exist for each box which are delivered to the leassee; in addition the boxes are simultaneously locked by the Kreditanstalt so that they can only be opened by both parties together. Moreover the leassees of boxes are permitted to put a pad-lock on to the hasp which covers the key-hole.

7) The leassee is responsible for the keys given to him. He is urgently advised to keep them in a safe place.

Intervener's Exhibit 9

If a leassee loses a key he has ~~the Kreditanstalt~~ to inform the Kreditanstalt immediately; the latter will take care of the change of the lock and the making of two new keys at the expense of the leassee.

8) Each leassee obtains with the signing of the lease agreement a pass-word; furthermore he is given an identification card bearing his name.

9) The disposal over a lease box shall as a rule be exercised by the leassee personally. If a box is leased by a Corporation the right of disposal is exercised by the persons empowered to sign for the Corporation in compliance with their State controlled registration single or collectively.

10) If a leassee wants to obtain for a third person the right of access into the steel safe and the right to dispose of the leased box and its contents, the execution of a written power of attorney covering the matter is required on the forms provided by the Kreditanstalt. The execution of this power of attorney and the co-signing by the attorneys in fact has to be done as a rule in the presence of a witness preferrably an employe of the steel safe.

A power of attorney given for an unlimited time for the disposal of the box and its contents remain valid up to the time when its cancellation in writing become known to the Kreditanstalt. Furthermore it expires at the moment in which the death of the grantor of the power of attorney or the event of his becoming incompetent becomes known to the Kreditanstalt, insofar as the opposite is not expressly stated.

Intervener's Exhibit 9

The Kreditanstalt does not take any responsibility in regard of the checking of the genuineness of the signatures on the power of attorneys in so far as these signatures have not been applied in the presence of one of its employees.

After the death of a leassee becomes known to the Kreditanstalt, it permits the disposal over the content of the leased box only to the executor or all heirs of the leassee jointly, or respectively their attorneys in fact, unless a power exists which is valid after the death of the leassee.

11) The Kreditanstalt also leases boxes to several persons at a time with the understanding that according to each agreement the entitled persons either jointly or each alone without the cooperation of the other leassees are entitled to open the box and to dispose of its content.

12) To gain access into the steel safe and to be admitted to open the box it is necessary that the leassee or its attorney in fact

    a) names the pass-word to the employe in charge of the ante-room of the steel safe,

    b) shows him his card of identification, or the eventual power of attorney by the leassee,

    c) shows him the kex to the box,

    d) and signs his name in the provided register.

13) For the purpose of manipulating the deposited precious objects (the cutting off of coupons etc.) the leassees of boxes have at their disposal the cabins situated in the ante-room and the ante-room itself.

Upon the desire of the leassees the Kreditanstalt takes charge of the cut of coupons or redeemed bonds for the purpose of collecting, takes care of conversions and reinvestment of available funds and is pleased to give information on all relevant verbal and written inquiries.

14) At the termination of the lease the leassee has to return both keys belonging to his box as well as the card of identification; anything missing as well as damage on the box caused by its used by the leassee will be replaced or repaired at the expense of the leassee.

In case that at the termination of the lease after written demand by the Kreditanstalt the keys and the card of identification are not returned by the leassee or his heirs, the Kreditanstalt is entitled, without legal proceedings and without the presence of a Public Notary, to open the safe and to make itself paid from its contents for eventual unpaid fees or other claims.

The demand shall be considered made towards the leassee if it is addressed by registered letter to the last address of the leassee known to the Kreditanstalt.

15) The leassees of boxes and their attorney-in-fact have for the sake of safety to comply with all regulations issued by the Kreditanstalt or its employes in charge.

16) The employes of the Anstalt are obliged to keep the strictest confidence in regard to the entire business activities of its customers, particularly in regard to their duties in the steel safe.

Intervener's Exhibit 10

Power of Attorney

The undersigned as leassee of the safe deposit box No. 1923 of the steel safe of the Schweizerische Kreditanstalt in Zürich hereby grants

Dr. Hanns Frankenberg & Mr. Adolf Gäng
only jointly

power of attorney during the entire duration of the lease to dispose of the box No. 1923 and its content upon identification in lieu of the undersigned in the same manner as according to the regulation the leassee is allowed to. The Schweizerische Kreditanstalt is authorized to open the named box for the attorneys in fact according to their wishes and to let them dispose over its contents.

The power of attorney is valid until the written revocation of it arrives at the Schweizerische Kreditanstalt; however it is expressly set forth that in the case of death or the beginning of incompetency of the leassee the authority of the attorneys in fact will not go out of effect but shall remain valid.

Zürich, April 18, 1934

The attorneys in fact
Hanns Frankenberg

Adolf Gäng

The leassee
Fritz von Opel

~~These signatures were added in the presence of~~:

(signatures
illegible)

Intervener's Exhibit 11 for Identification

Swiss Compensation Office
Department for the liquidation of German property
Zürich

Dr. P. Gmür-Henggeler
Attorney
Löwenstr. 1
Zürich

Zürich, Talstr. 62
September 7, 1951

Overseas Finanz Korporation, Liestal and
Frima Verwaltungsanstalt, Vaduz.

My dear Doctor,

We kindly refer to our discussions in the above matter and to the investigation carried out by us and can, in confirmation of our verbal statements, inform you as follows:

Based upon the files submitted to us it results that on October 5, 1931 Mr. Geheimrat Wilhelm von Opel has made a gift to his son Fritz von Opel of RM 6 million shares of the Adam Opel corporation under the charge that the usufruct on them remains with him and his wife. Our examinations lead us to the opinion that the requirements for the establishment of a usufruct—the transfer of the securities to the person entitled—has not been met so that in effect no usufruct, i.e. no right in rem has been established or has been created.

From our point of view this clause cannot be solely so interpreted as if in effect a usufruct, i.e. a right in rem

Intervener's Exhibit 11 for Identification

should have been established. We rather believe that with this clause Fritz von Opel obligated himself personally and was required to obligate himself to put at the disposal of his parents the income from these shares or their substitutes. There is therefore not involved a right in rem but an obligatory right. This right does not rest with the securities and therefore cannot be asserted against the Corporation into which the securities had been transferred but could be only if the obligatory commitment of Fritz von Opel was accepted by it which was never asserted nor shown.

In addition we are faced with the further question whether this obligatory claim still exists today in view of the subsequent declarations of the parents of Fritz von Opel particularly the declarations to the German authorities.

We have refrained from clarifying this question any further because it is irrelevant for the determination of the questions in which we are interested for the following reasons.

As we have already stated no right in rem exists on these securities, i.e. the parents von Opel have not the least claim of any kind towards the Overseas Finanz Korporation as well as towards the Frima Verwaltungsanstalt.

If however an obligatory i.e. in personam claim against Fritz von Opel should exist—a transfer to both the above named Corporations has never been asserted nor even less shown—it would be an asset which does not lie within Switzerland within the meaning of the Washington Accord because Fritz von Opel uncontestedly did not live in Switzerland but in America between March 1940 until September 1950. After Fritz von Opel has come to Switzerland only in September 1950 any eventual obligation of him would have to be regarded as an asset in Switzerland which should be considered as lying in Switzerland after the deadline of December 31, 1947.

Based upon all these considerations we therefore release both the above named Corporations, Overseas Finanz-Korporation and Frima Verwaltungsanstalt, from the regulations of the Federal Council's order of February 16, 1945 & ff. The submitted applications of April 21, 1946 we have annulled. The Mixed Commission has been accordingly notified.

For the release we are entitled to a fee of Fr. 50.—for which you will receive a separate bill. The costs caused by the performance of the investigated will be treated and charged separately.

With expression of high esteem

Swiss Compensation Office
for the liquidation of German property

sig. Ott sig: Mollet

Intervener's Exhibit 13

I/S18636

Acknowledgment of Indebtedness

Overseas Finance Corporation, Zurich, as debtor,
herewith acknowledges that it owes to
Frima-Verwaltungs-Anstalt, Vaduz, as creditor
an amount of

Fr. 11,027,411.90
(in words: Eleven million twenty-seven thousand four hundred eleven and 90/100).

The following agreements shall govern this debt:

1. The debt is established in such manner that the creditor may at any time terminate it by a two years' notice.

If such notice is given the debtor is entitled to deliver to the creditor, in lieu of payment in cash, its own shares at par value on the due date.

2. The debtor is entitled to pay back the debt acknowledged at any time, with an advance notice of three months. It also has the right to pay back, upon advance notice of three months, partial amounts in instalments in round figures divisible by 10,000 U. S. dollars.

3. The interest on the loan shall depend upon the business profits in such manner that a yearly interest of 5% (five per cent) shall be payable only if a dividend of 6% on the shares has been distributed after appropriate reserves have been set aside. Such dividend on the shares shall have cumulative preference over the interest on the debt. Interest on the debt, however, shall not be cumulative.

Intervener's Exhibit 13

Page 2.

4. Disputes concerning this debt shall be decided by the Commercial Court of the Canton of Zurich, subject to the right of appeal to the Swiss Supreme Federal Court, and Zurich is acknowledged by both the creditor and the debtor as the exclusive place of jurisdiction.

Zurich, June 18, 1936

Intervener's Exhibit 14

Memorandum

In our discussion today we discussed the problem of settling your fees for the work done by you in the past years in so far as no special agreements were made in separate cases (usufruct matter: contingency fee RM 35.000.—, forest damage suit: joint prosecution with 75% participation on my part and 25% on your part in regard to the claim as well as the costs of litigation). We agreed that on account of the absence of my son, who has represented me in all matters which you handled, it is suitable to delay the settlement of your fees for the time being.

/s/ Dr. Wilhelm von Opel

Berlin, November 29, 1940.

Intervener's Exhibit 15

Dr. ing. e. h. Wilhelm von Opel
Geheimer Kommerzienrat

Wiesbaden, June 28th, 1946
Bierstadterstr. 37

Dr. Daniel Gros
Karl von Lindestr. 8
Wiesbaden-Dotzheif

Dear Doctor,

I am pleased to fulfil your wish to obtain a credit and I am arranging for you a first credit of RM 50.000,—(fifty thousand) with the Deutsche Bank, Wiesbaden.

After you have bought with that credit the shares you have in mind and after you have pledged them to me as collateral, I will make available to you again a second credit in the amount of RM 50.000,—(fifty thousand) against pledge to me of those shares purchased with the second credit.

If I am thereby arranging for you a credit in the amount of RM 100.000,—(one hundred thousand) I want to emphasize however that the amount of fees due you is in no way to be prejudiced.

Rather, the credit is a separate matter and the settlement of your fee and the payment will be effected by my son as soon as he is back since my son has represented me in all important matters in which you acted and he alone can give a correct judgment on the value and extent of your work.

With best regards,

Yours,

(Signed) Dr. Wilhelm von Opel

Intervener's Exhibit 16

SECOND TITLE.

Usufruct (*o*).

I.—Usufruct of Things.

1030. A thing (*p*) may be charged with a right in such manner that the person in whose favour the right is created is entitled to draw the emoluments of the thing (*i.e.*, a usufruct) (*q*).

A usufruct may be limited by the exclusion of certain classes of emoluments (*r*).

1031. By virtue of the usufruct of a piece of land the usufructuary acquires the usufruct of its accessories (*s*) under the provisions of 926 applicable to acquisition of ownership.

1032. For the grant of a usufruct of a moveable it is necessary that the owner deliver the thing to the acquirer

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(*o*) This title deals only with those usufructs which are created by juristic acts. The code does not recognize any *statutory* usufructs except the cases of the "usufruct" by the husband of the wife's property (1363 *et seq.*), and the "usufruct" by the father (or by the mother) of the child's property. 1649 *et seq.*, 1683, 1686. These two cases are, however, subject to the special provisions under their respective heads, and the rules of "usufruct" apply only in cases where it has been expressly so provided. See, *e.g.*, 1378, 1383, 1384, 1652 and 1663.

(*p*) Cf. 90—103. For the creation of a usufruct of a piece of land, registration in the land register is necessary. Cf. 873—902.

(*q*) A usufruct, being a personal servitude, can be created only in favour of a particular person.

(*r*) A usufruct may be created in respect of a fractional part of a thing.

(*s*) *I.e.*, in addition to the usufruct of its component parts. Cf. 93—96. On the meaning of "accessories," see 97 and 98.

and a real agreement be made between the parties that the usufruct shall belong to the latter. The provisions of 929, sentence 2, and 930 to 936 apply *mutatis mutandis;* in the cases provided for by 936 the only effect is that the usufruct takes priority to the right of the third party.

1033. The usufruct of a moveable may be acquired by usucapion (*t*). The provisions applicable to acquisition of ownership by usucapion apply *mutatis mutandis* (*u*).

1034. The usufructuary may have the condition of the thing determined by experts at his own expense. The owner has the same right.

1035. In the case of a usufruct of an aggregate of things the usufructuary and the owner are mutually bound to concur in drawing up an inventory. The inventory shall bear the date when it was drawn up, and shall be subscribed by both parties; either party may require that the subscription be publicly certified. Either party may also require that the inventory be drawn up by the competent public authority, or a competent official, or notary. The party who requires such drawing up or certification shall bear and advance the costs.

1036. The usufructuary is entitled to the possession of the thing (*x*).

In the exercise of the right of use he shall continue the former economic purpose of the thing and shall act according to the rules of proper management.

(*t*) On the usucapion of a usufruct of land, see 900.

(*u*) *I.e.,* 937—945.

(*x*) Cf. 854 *et seq.,* 868, 1065.

Intervener's Exhibit 16

1037. The usufructuary is not entitled to transform the thing or to alter it essentially.

The usufructuary of a piece of land may erect new structures for the purpose of obtaining stone, gravel, sand, loam, clay, marl, peat, and other component parts of the soil (*y*) in so far as the economic purpose of the land is not thereby essentially altered.

1038. If a forest is the object of a usufruct, both the owner and the usufructuary may require that the extent of the use and the manner of the economic operations shall be settled by a plan of management. If an important change of circumstances comes about, either party may require a corresponding change of the plan of management. Each party shall bear one-half the expenses.

The same rule applies if a mine or other structure designed for obtaining component parts of the soil is the object of the usufruct.

1039. The usufructuary also acquires ownership of any fruits (*z*) which he takes contrary to the rules of proper husbandry, or which he takes in excess where this has become necessary in consequence of some special occurrence. He is, however, without prejudice to his responsibility for fault (*a*), bound to make good to the owner at the termination of the usufruct the value of the fruits, and to give security (*b*) for the fulfilment of such obli-

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(*y*) All component parts of the soil acquired by the usufructuary belong to him. See 99, par. 2; and 954.

(*z*) Where the fruits consist in products or other component parts of the thing, ownership is acquired upon their separation from the thing. See 954.

(*a*) If fault is imputable to him, the provisions of 823 *et seq.* are applicable.

(*b*) See 232—240.

gation. Both the owner and the usufructuary may require that the amount to be made good be applied to the restoration of the thing in so far as it is consistent with proper husbandry.

If such application to the restoration of the thing is not required, the duty of making compensation is extinguished in so far as the emoluments accruing to the usufructuary are injured by the irregular or excessive taking of the fruit.

1040. The right of the usufructuary does not extend to the share of the owner in treasure trove (*c*) which is found in the thing.

1041. The usufructuary shall take care of the preservation of the thing in its economic condition. The duty to make repairs and renewals is incumbent upon him only in so far as they are connected with the customary preservation of the thing.

1042. If the thing is destroyed, or damaged, or an extraordinary repair or renewal of the thing or a precaution for the protection of the thing against an unforeseen danger becomes necessary, the usufructuary shall give notice to the owner without delay. The same rule applies if a third party claims any right over the thing.

1043. If the usufructuary of a piece of land himself undertakes an extraordinary repair or renewal which has become necessary (*d*) he may, for this purpose, within the limits of proper management, apply component parts of the land which do not belong to the fruits accruing to him.

(*c*) For the meaning of the words "treasure trove," see 984.

(*d*) Since he is not bound to do this, he has a claim for compensation as provided for in 1049.

Intervener's Exhibit 16

1044. If the usufructuary does not himself undertake a repair or renewal of the thing which has become necessary, he shall allow the owner to undertake it and, where land is the object of the usufruct, to apply the component parts of the land specified in 1043.

1045. The usufructuary shall, at his own expense, take out insurance against damage by fire and other accidents to the thing for the term of the usufruct, if such insurance is in accordance with the rules of proper management. The insurance shall be taken out in such manner that the claim against the insurer belongs to the owner.

If the thing has already been insured, the payments to be made on the insurance shall be made by the usufructuary during the term of the usufruct in so far as he would be bound to insure the thing (*e*).

1046. The usufructuary has a usufruct of the claim against the insurer under the provisions (*f*) which apply to usufruct of an outstanding claim which bears interest.

If any damage occurs which is covered by the insurance, both the owner and the usufructuary may require that the insurance money be applied to the restoration of the thing or to the creation of a substitute in so far as this is consistent with proper management. The owner may himself take charge of such application or leave it to the usufructuary.

1047. A usufructuary is bound, during the term of the usufruct, to bear on behalf of the owner all public charges

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(*e*) In this case the owner alone has the right to require the usufructuary to make the payments due on the insurance.

(*f*) See 1076—1079.

Intervener's Exhibit 16

upon the thing, with the exception of the extraordinary charges which are deemed to be imposed upon the corpus of the thing; and all private charges upon the thing existing at the time of the grant of the usufruct, *e.g.*, interest upon hypothecary claims and land charges; and also any payments to be made by reason of an annuity charge (*g*).

1048. If a piece of land with its appurtenant stock is the object of a usufruct, the usufructuary may dispose of the individual units of the stock within the limits of proper management. He shall (*h*) provide for making good any deterioration caused by ordinary use, and also the units of the stock which are consumed according to the rules of proper management; the articles provided by him become, upon incorporation in the stock, the property of the person to whom the stock belongs.

If the usufructuary takes the appurtenant stock at an appraised valuation with the obligation to return it at the termination of the usufruct at an appraised valuation, the provisions of 588, 589 apply *mutatis mutandis*.

1049. If the usufructuary incurs any outlay upon the thing, although he is not bound to do so, the duty of the owner to make compensation is determined according to the provisions relating to management of affairs without mandate (*i*).

(*g*) Similarly this provision applies to payments to be made by reason of a perpetual charge on land. 1105 *et seq.*

(*h*) At his own expense.

(*i*) *I.e.*, 677 *et seq.*

Intervener's Exhibit 16

The usufructuary is entitled to remove an attachment with which he has provided the thing (*k*).

1050. The usufructuary is not responsible for any alteration or deterioration of the thing which is brought about by the proper exercise of the usufruct (*l*).

1051. If the conduct of the usufructuary causes apprehension of a serious violation of the rights of the owner, the owner may require security to be given (*m*).

1052. If the usufructuary is ordered by a non-appellable decree to give security, the owner may require, instead of security, that the exercise of the usufruct be assigned to a receiver to be appointed by the Court to act on behalf of the usufructuary. The decree appointing a receiver may be issued only if a period for the giving of security has been allotted by the Court to the usufructuary upon the

application of the owner, and the period has elapsed; the decree may not be issued if the security is given before the expiration of the period.

The receiver is under the supervision of the Court like a receiver appointed by the Court for the compulsory management of land. The owner may also be appointed receiver.

The management by the receiver shall be terminated, if security be subsequently given.

(*k*) Cf. 258.

(*l*) As to what constitutes a "proper exercise of the usufruct," see 1036, par. 2; 1037 and 1041.

(*m*) See 232—240.

Intervener's Exhibit 16

1053. If the usufructuary uses the thing in an unauthorised way, and if he continues so to use the thing in spite of a warning by the owner, the latter may apply for an injunction.

1054. If the usufructuary violates the rights of the owner to a serious extent, and if he continues the injury in spite of a warning by the owner, the latter may demand a decree of management as provided for in 1052.

1055. The usufructuary is bound to return the thing to the owner after the termination of the usufruct.

In the case of a usufruct of agricultural land the provisions of 591, 592 apply *mutatis mutandis;* in the case of a usufruct of a farm the provisions of 591 to 593 apply *mutatis mutandis.*

1056. If the usufructuary has let a piece of land under an ordinary or usufructuary lease which extends beyond the term of the usufruct, after the termination of the usufruct the provisions of 571, 572, 573, sentence 1, and 574 to 576, 579 applicable to the case of alienation apply *mutatis mutandis.*

The owner is entitled to give notice of the termination of the lease, subject to the statutory term of notice (*n*). If the usufructuary relinquishes the usufruct, the notice is permissible only after the time at which the usufruct would become extinct even if it had not been relinquished.

The lessee is entitled to summon the owner to make a declaration within a fixed reasonable period whether or not he will exercise his right of giving notice. The notice may be given only before the expiration of the period.

(*n*) See 565 and 595.

Intervener's Exhibit 16

1057. The claims of the owner for compensation on account of alterations or deterioration of the thing and the claims of the usufructuary for reimbursement of outlay incurred, or for permission to remove an attachment, are barred by prescription in six months. The provisions of 558, pars. 2 and 3, apply *mutatis mutandis.*

1058. As between the usufructuary and the owner the grantor of the usufruct is deemed to be the owner in favour of the usufructuary, unless the usufructuary knows that the grantor is not owner.

1059. Usufruct is not transferable (*o*). The exercise of the usufruct may be transferred to another (*p*).

1060. If a usufruct conflicts with another usufruct or another right of use of the thing in such manner that the rights cannot, or cannot completely, be exercised concurrently, and if the rights have equal rank (*q*), the provision of 1024 applies.

1061. A usufruct is extinguished upon the death of the usufructuary. If the usufruct belongs to a juristic person, it is extinguished upon the loss of juristic personality.

1062. If the usufruct of a piece of land is terminated by a juristic act, in case of doubt the termination extends also to the usufruct of its accessories.

(*o*) It cannot therefore be pledged. See 1274, par. 2.

(*p*) The transferee has, in such a case, only a *jus in personam* against the usufructuary.

(*q*) See 879 *et seq.*

Intervener's Exhibit 16

1063. The usufruct of a moveable is extinguished if the ownership and the usufruct merge in the same person (*r*).

The usufruct is deemed not to be extinguished in so far as the owner has a legal interest in the continuance of the usufruct.

1064. A declaration made by the usufructuary to the owner or grantor that he gives up the usufruct is sufficient to terminate the usufruct of a moveable by juristic act.

1065. If the right of the usufructuary is injured, the provisions applicable to claims arising from ownership (*s*) apply *mutatis mutandis* to the claims of the usufructuary.

1066. If a usufruct exists in the share of one co-owner (*t*), the usufructuary exercises the rights which result from the community of the co-owners in respect of the management of the thing and the manner of its use.

The dissolution of the community may be demanded only by the co-owners and the usufructuary jointly.

If the community is dissolved, the usufruct of the objects which take the place of the share enure to the usufructuary.

1067. If fungible things (*u*) are the object of a usufruct, the usufructuary becomes owner of the things; after the termination of the usufruct he shall make good to the grantor the value which the things had at the time of the

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(*r*) This provision is not applicable to a usufruct of land. See 889.

(*s*) See 985—1007, 1011.

(*t*) Cf. 1008.

(*u*) Cf. 92.

Intervener's Exhibit 16

grant. Both the grantor and the usufructuary may have the value determined by experts at his own expense.

The grantor may require security to be given if the claim for making good the value is endangered.

II.—Usufruct of Rights.

1068. The object of a usufruct may also be a right.

The provisions relating to the usufruct of things apply *mutatis mutandis* to the usufruct of rights, unless a contrary intention appears from 1069 to 1084.

1069. The grant of a usufruct of a right is effected according to the provisions applicable to the transfer of rights (*x*).

A usufruct of a right which is not transferable may not be granted.

1070. If a right by virtue of which an act of performance can be demanded (*y*) is the object of a usufruct, the

provisions which apply to the legal relation between the acquirer and the person bound in the case of a transfer of the right (*z*) apply *mutatis mutandis* to the legal relation between the usufructuary and the person bound.

If the exercise of the usufruct is transferred to a receiver as provided for in 1052, the transfer is effective as against the person bound only if he has knowledge of the decree issued; or if the decree is communicated to him. The same

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(*x*) See 398 *et seq.;* and 873.

(*y*) *E.g.*, an interest-bearing claim, or a perpetual charge on land.

(*z*) See, *e.g.*, 404—410.

rule applies to the termination of the management by the receiver.

1071. A right subject to a usufruct may be terminated by juristic act only with the consent of the usufructuary. The consent shall be declared to the person in whose favour it is given; it is irrevocable. The provision of 876, sentence 3, remains unaffected.

The same rule applies to the case of an alteration of the right, so far as the alteration impairs the usufruct.

1072. The usufruct may also be terminated in the manner provided for by 1063, 1064, even if the right subject to the usufruct is not a right over a moveable (*a*).

1073. The usufructuary of an annuity, a right to recurring acts of performance stipulated for in the transfer of a farm, or a similar right, can demand the several payments which can be demanded by reason of the right (*b*).

1074. The usufructuary of a claim is entitled to collect the claim, and, if its maturity depends upon notice by the creditor, to give such notice. He shall take care for its proper collection. He is not entitled to make other dispositions of the claim.

1075. Upon payment by the debtor to the usufructuary the creditor acquires the object given in payment, and the usufructuary acquires the usufruct of the object.

If fungible things (*c*) are given in payment, the usufructuary acquires the ownership of such things; the provisions of 1067 apply *mutatis mutandis*.

(*a*) *E.g.*, a hypotheca.

(*b*) Cf. I. A., Art. 96.

(*c*) Cf. 92.

Intervener's Exhibit 16

1076. If a claim bearing interest is the object of a usufruct, the provisions of 1077 to 1079 apply.

1077. The debtor may pay the principal only to the usufructuary and the creditor in common. Either of them may require that payment be made to them in common; either may demand lodgment on their joint account, instead of payment.

The usufructuary and the creditor may only give notice in common. Notice by the debtor is effective only if it is communicated to the usufructuary and the creditor.

1078. If the claim is matured, the usufructuary and the creditor are mutually bound to concur in its collection. If maturity depends upon notice, either party may require the other to concur in giving notice, if the collection of the claim is required by the rules of proper management of property on account of danger to its security.

1079. The usufructuary and the creditor are mutually bound to concur in the investment of the collected capital under the provisions (*d*) applicable to the investment of money belonging to a ward, and in the simultaneous grant of a usufruct to the usufructuary. The usufructuary determines the manner of investment.

1080. The provisions relating to the usufruct of a claim apply also to the usufruct of a land charge (*e*), or of an annuity charge (*f*).

(*d*) See 1807, 1808.

(*e*) See 1191 *et seq.*

(*f*) See 1199 *et seq.*

Intervener's Exhibit 16

1081. If the object of a usufruct is an instrument payable to bearer or an instrument to order endorsed in blank, the possession of the instrument and of its renewal coupons belongs to the usufructuary and the owner jointly. The possession of the interest coupons, annuity coupons, or dividend coupons of the instrument belongs to the usufructuary.

For the grant of the usufruct, the creation of joint possession suffices instead of the delivery of the instrument.

1082. The instrument together with its renewal coupons shall, on demand by the usufructuary or owner, be lodged

in a lodgment office, subject to the condition that withdrawal can be required only by the usufructuary and the owner in common. The usufructuary may also require lodgment in the Imperial bank.

1083. The usufructuary and the owner of the instrument are mutually bound to collect the matured principal; to procure new interest coupons, annuity coupons, or dividend coupons; and to concur in other measures which are required by the rules of proper management of property.

In case of the payment of the instrument the provisions of 1079 apply. Any surplus paid at the time of payment is deemed to be part of the principal.

1084. If an instrument to bearer or an instrument to order indorsed in blank is a fungible thing within the meaning of 92, the provisions of 1067 apply.

III.—Usufruct of a Person's whole Property.

1085. A usufruct of the whole property of a person may be granted only in such manner that the usufructuary acquires the usufruct of the individual object comprised in such property. Where the usufruct is so granted, the provisions of 1086 to 1088 apply.

1086. The creditors of the grantor may, in so far as their claims were created before the grant, demand satisfaction out of the objects subject to the usufruct, without regard to the usufruct. If the usufructuary has acquired ownership of fungible things (*g*), the claim of the grantor for reimbursement for the value takes the place of the things; the usufructuary is bound towards the creditors to make immediate reimbursement.

1087. The grantor may, if any claim created before the grant is due, require the usufructuary to return the objects necessary for the satisfaction of the creditor. The grantor has the right of selection; he may, however, only select

the appropriate objects. If the objects returned suffice, the grantor is bound to satisfy the creditor on behalf of the usufructuary.

The usufructuary may fulfil the obligation by delivery of the object owed. Where the object owed is not included in the property which is subject to the usufruct, the usufructuary is entitled, for the purpose of satisfying the creditor, to alienate an object belonging to the property, if satisfaction by the grantor cannot be expected with certainty. He has to select an appropriate object. Where he is bound to make reimbursement for the value of fungible things he cannot alienate.

(*g*) Cf. 92, 1067, 1084.

Intervener's Exhibit 16

1088. The creditors of the grantor, whose claims were already bearing interest at the time of the grant, may also demand interest from the usufructuary during the term of the usufruct. The same rule applies to other periodical payments which, in due course of management, are paid out of the income of the property, provided the claim was created before the grant of the usufruct.

The liability of the usufructuary may not be excluded or limited by agreement between him and the grantor.

The usufructuary is liable to the grantor for the satisfaction of the creditors in respect of any of the claims specified in par. 1. The grantor may require the return of any objects for the purpose of satisfying the creditors only if the usufructuary is in default with the fulfilment of the obligation to make such satisfaction.

1089. The provisions of 1085 to 1088 apply *mutatis mutandis* to the usufruct of an inheritance.

Intervener's Exhibit 18 for Identification

(Hegetschweiler Deposition)

Depositions of witnesses, taken before me, Robert M. Forcey, Vice Consul of the United States of America, duly commissioned and qualified, presiding officer, at the American Consulate, 13 Bockenheimer Anlage, Frankfurt/Main, at 2:30 p.m., August 19, 1954, pursuant to the request of Intervener Fritz von Opel.

For the Intervener Fritz von Opel:

Mr. Edward J. Ennis
165 Broadway
New York, N.Y.

For the Defendants

Mr. Myron C. Baum
Department of Justice
Washington 25, D.C.

and

Mr. Gerard F. Charig
Department of Justice, Overseas Branch
APO 108, c/o Postmaster New York, N.Y.

It appearing that the witnesses are not fully conversant with the English language and do well understand the German language, one Mr. Herbert Gontard, who well understands said languages, was employed as interpreter. Mr. Gontard was first duly sworn.

The said interrogatories and the answers of the witnesses thereto were taken down stenographically by Mrs. Herta I. Brown, and were then forthwith transcribed by her under my direction; the reporter was first duly sworn.

The presiding officer administered the oath to the witness, Mr. Rudolf Hegetschweiler.

Whereupon, Mr. Rudolf Hegetschweiler was called by Intervener Fritz von Opel, and testified through the interpreter as follows:

Direct Examination of the Witness by Counsel for Intervener Fritz von Opel

By Mr. Ennis:

Q. Dr. Hegetschweiler, will you state your full name? A. Dr. Rudolf Hegetschweiler.

Q. And your residence address? A. Zurich, Switzerland, Engimattstr. 6.

Q. What is your business or occupation? A. Attorney. I am presently employed as a prokurist in a bank.

Q. What bank? A. Schweizerische Kredit-Anstalt (Credit Suisse).

Q. Dr. Hegetschweiler, before I ask you questions, I understand that you have a preliminary statement you would like to make. Will you do so? A. Yes, I would like to make the following statement: As you probably know, the laws of Switzerland do not allow hearings before a foreign authority or a consulate of any foreign country, the Swiss courts being exclusively competent for the examination of witnesses. When I came to Frankfurt to answer the questions in this particular case, that does not mean that we, i.e. my bank and I, recognize the jurisdiction of the United States Consulate. I did it on my own accord and for no other reason than to be of assistance to our client, Mr. Fritz von Opel, who asked me to attend this hearing instead of being examined by the competent Swiss court. This attitude can by no means be considered as a precedent, and in any other case we reserve to ourselves the right to be examined by our competent Swiss court only.

As officer of a Swiss bank, I am bound by the legal secrecy of the banker. I can only answer the questions after having been formally released from my duty by the customer of my bank, who is Mr. Fritz von Opel. As he is present, he will, I suppose, give me the necessary discharge.

Q. Dr. Hegetschweiler, have you examined the records of your bank in respect to a safe deposit box number 1923? A. Yes.

Mr. Ennis: Reporter, will you mark these papers as Intervener's Exhibits 1, 2, 3 and 4 for identification.

(The reporter marked the exhibits as requested).

Q. Have you brought some of those bank records with you? A. Yes.

Q. I show you Intervener's Exhibits 1, 2, 3 and 4 for identification, will you briefly describe what each one of those is? A. Number 1 is a contract concerning the renting of a safe deposit box.

Q. Does it show to which individual the box was rented? A. Yes, it was rented to Mr. Fritz von Opel.

Q. Under the practice of the bank, did Mr. Fritz von Opel receive a copy of that contract? A. Yes.

Q. Will you briefly describe what Exhibit 2 is? A. Exhibit 2 is a power of attorney signed by Mr. Fritz von Opel, authorizing Dr. Hanns Frankenberg und Mr. Adolf Gaeng to open this strong box, but only jointly.

Q. What is the date of that power of attorney? A. April 18, 1934.

Q. Will you briefly describe the nature of Intervener's Exhibit number 3? A. Intervener's Exhibit number 3 is a letter from Mr. Fritz von Opel, dated June 26, 1933, addressed to the Credit Suisse empowering Dr. Hans Frankenberg of Zuerich to have access once to the safe deposit box and take out the shares of the Overseas Finance Corporation, which were contained therein, and to replace them after being stamped.

Q. Will you briefly describe the nature of Intervener's Exhibit number 4? A. Intervener's Exhibit number 4 is a so-called control index card of our Safe Deposit Department, on which are noted down all dates and events of any importance pertaining to the deposit box in question.

Q. Does that card show on what dates access was had by any person to that box? A. Yes.

Q. Will you state the dates of access shown by the card? A. July 11, 1933, December 20, 1933, April 18, 1934, May 1, 1934, May 30, 1934, October 5, 1934, November 15, 1935, May 30, 1936, and there is nothing further until after the war. On March 4, 1946, the safe deposit box was opened by the Swiss Compensation Office.

Q. Does that record show which individual or individuals had access to the safe deposit box on those dates? A. No, whenever the person who rented the safe deposit box or one of his regular attorneys-in-fact had access, this fact was not noted. However, if a special attorney-in-fact had access to the box, or the Swiss Compensation Office, then that fact was noted opposite the date concerned.

Q. Is there such a notation contained thereon in respect to July 11, 1933? A. Yes, the special power of attorney for

Dr. Hans Frankenberg, Exhibit number 3, is referred to here expressly.

Q. Is there any other record of the bank which shows what individual or individuals had access to the box on the other dates which you mentioned? A. Yes.

Q. Have you examined those records? A. Yes.

Q. Will you describe what kind of a record that is? A. Each visitor has to sign on a special card when he has access to the safe deposit box.

Q. How are those cards kept? A. They are tied together at the end of any particular year and are kept in one place.

Q. Have you brought those records with you, Dr. Hegetschweiler? A. No.

Q. Will you explain why not? A. Because in these bound books the signatures of other persons having rented safe deposit boxes appear as well. And pursuant to Swiss banking laws relating to the signatures of third parties, I cannot submit such records.

Q. Will you state, if you know, what the records show about access to this particular box on the particular dates mentioned on the card?

> Mr. Baum: I object to this question and the answer it requests on the ground that the records themselves are the best evidence of their contents and no sufficient legal excuse has been shown to justify their non-production under American law.

A. One opening on July 11, 1933 made by Hans Frankenberg. Next two openings . . . I must say at this point that at some time in the past I made a study of this and made a list in writing and that I may make an error in just reading it off here.

Q. Do you have your list with you, Dr. Hegetschweiler? A. No.

Q. I show you what purports to be copy of an affidavit by you, Dr. Hegetschweiler, sworn to on November 25, 1953, does that refresh your recollection as to what the record shows as to which individual or individuals had access to the box on those dates? A. Yes. When I worked on this affidavit, I had the original before me.

> Mr. Baum: Let the record show that this affidavit which has been shown to the witness is a copy of the same affidavit which was annexed to the motion paper of Intervener Fritz von Opel on his motion for issuance of letters rogatory.
>
> Mr. Ennis: That is correct.

Q. Will you state, Dr. Hegetschweiler, who had access to the safe deposit box on those dates. A. The first one we have already noted, that was Dr. Hans Frankenberg. On December 20, 1933, Mr. Fritz von Opel. On April 18, 1934, Mr. Fritz von Opel. On May 1, 1934, Dr. Hans Frankenberg and Adolf Gaeng. On May 30, 1934, Dr. Hans Frankenberg and Adolf Goeng. On October 5, 1934, Mr. Fritz von Opel. On November 15, 1935, Dr. Hans Frankenberg and Adolf Gaeng, and on May 30, 1936, Dr. Hans Frankenberg and Adolf Gaeng. These are all the openings that are listed on the card, Exhibit number 4.

Q. Under the lease contract, Intervener's Exhibit number 1, and the practice of the bank, did Mr. Fritz von Opel at all times during regular banking hours have access to the box? A. Yes.

Q. Did he have access to the box even if he did not have the key to the box? A. Yes.

Q. In such a case where, for example, the lessee had lost his key, what was the practice of the bank in giving him access to the box? A. In those cases we get a locksmith and open the box by force.

Q. Would the possession of a key by a person other than the lessee of the safe deposit box give that other person access to the box? A. No. The key in itself is never enough to prove legitimate access.

Q. What else is normally required? A. A power of attorney.

Q. Could the power of attorney, Intervener's Exhibit number 2, be revoked by Mr. Fritz von Opel at any time?

> Mr. Baum: Objection to that question. The document itself is the best evidence of its contents.
>
> Mr. Ennis: I will restate the question.

Q. I ask you, Dr. Hegetschweiler, please examine again Intervener's Exhibit number 2, and tell me—if you can—the answer to this question: If Mr. Fritz von Opel at any time advised the bank that he had revoked that power of attorney, could Dr. Frankenberg and Mr. Gaeng have access to the box? A. Revocation of such power of attorney is admissible at any time and results in the attorneys-in-fact not having any further access.

Q. Did the lessee of such a safe deposit box receive more than one key from the bank? A. Two keys.

Q. Dr. Hegetschweiler, have you examined the records in respect to safe deposit box number 1917? A. Yes.

Q. Have you brought those records with you? A. No.

Q. Why not? A. I found that this particular safe deposit box number 1917 had nothing to do with Mr. Fritz von Opel or Dr. Frankenberg or Dr. Gaeng, or with any company in which Mr. Fritz von Opel was a partner or member.

Mr. Baum: I move to strike the last part of the witness's answer as embodying a legal conclusion of the witness.

A. (cont'd) The lessee is a private individual.

Q. The records on that box do not refer to the Uebersee Finanz Korporation nor Frima Verwaltungsanstalt?

Mr. Baum: I object to this question and I also move to strike the previous answer of the witness on the ground that the records of the bank are the best evidence of their contents, and no sufficient legal excuse has been shown for the non-production of such records.

A. Not insofar as I was able to determine.

Q. Dr. Hegetschweiler, under Swiss law are you forbidden to produce the records of that box without the permission of the lessee of the box? A. That is right.

Mr. Ennis: No further questions, thank you, Dr. Hegetschweiler.

Cross-Examination of the Witness by Counsel for the Defendants

Mr. Baum: Before cross-examining this witness, I would like to state that by asking this witness any questions or by questioning him concerning the contents of the documents, Intervener's Exhibits 1, 2, 3, and 4, which he has produced today, I am not waiving any objections to the failure to produce other documents, nor am I acquiescing in any construction of Swiss law which forbids their production in an American legal proceeding. I would also like to state that some time before this deposition was taken, when Mr. Ennis informed me that he would endeavor to secure the testimony of Dr. Hegetschweiler in Germany instead of in Switzerland, that I informed Mr. Ennis that I would like Dr. Hegetschweiler to produce at the time of his testimony the records pertaining to box number 1917, as well as those pertaining to safe deposit box number 1923.

Mr. Ennis: That is correct.

Mr. Baum:

Q. How long have you been employed by the Credit Suisse, Dr. Hegetschweiler? A. For six years.

Q. Since 1948? A. August 1, 1948.

Q. And what are your functions in the Swiss bank? A. I am working in the legal department.

Q. You don't have custody of any of these records of the bank, such as Intervener's Exhibits 1, 2, 3, and 4, don't you? A. No.

Q. And you have not made any entries on Intervener's Exhibit 4, have you? A. No.

Q. And you don't know who did, do you? A. An officer of our safe deposit box department.

Q. Well, that is an assumption on your part, is it not?

A. Yes. I am compelled to do so rather strongly, because there cannot be any other way.

Q. It is a fact, is it not, Dr. Hegetschweiler, that there is not one single entry on this card, Intervener's Exhibit number 4, which has been made since you were employed by the Credit Suisse? A. Sure, that is clear.

Q. And you have no personal knowledge as to who made the entries in the right hand column on this entire card, have you? A. The answer is difficult. I know who it was but, of course, I was not personally present.

Q. Now, Dr. Hegetschweiler, referring to Intervener's Exhibit number 2, am I correct when I ask you, is it not true that the red markings on that page were made by officials of the bank? A. Yes.

Q. Referring to Intervener's Exhibit number 3, which is a letter from Mr. Fritz von Opel, dated June 26, 1933, I call your attention to the fact that the number 1932 is stricken out and there is an insertion in ink in this letter. Is that not correct? A. Yes.

Q. Can you tell me what that ink notation says? A. It says corrected, and the signature is probably Dr. Frankenberg's.

Mr. Baum: I ask for a concession by Counsel that that is Dr. Frankenberg's signature.

Mr. Ennis: It is conceded.

Q. I believe, Dr. Hegetschweiler, you said you are a Swiss attorney, is that correct? Isn't it rather strange to you as an attorney, that the attorney-in-fact is allowed by the bank to correct his own power of attorney?

Mr. Ennis: I object to the question in that it calls for the witness's opinion.

Q. This document, Intervener's Exhibit number 3 authorized Dr. Frankenberg to have access to a safe deposit box. Does it not? A. Yes.

Q. And as that letter appears, it originally authorized him to have access to box number 1932 and that was changed to 1923. Isn't that correct?

Mr. Ennis: I object to this question on the ground that the statement is a conclusion, not a question. It does not appear when that was changed, it might have been changed before Mr. von Opel signed it.

A. Yes. In as much as I only joined the bank in 1948, I, of course, cannot testify as to whether this change was made before or after he presented it to us.

Q. You are familiar with the practices of the bank, are you not? A. Yes.

Q. Is it customary practice in your bank to recognize a power of attorney when that power of attorney contains a change in it which is not initialed or signed by the owner of the box? A. That depends on the importance of the modification.

Q. Have you any knowledge as to who the owner of safe deposit box number 1932 is? A. No.

Q. Have you produced the records pertaining to that box? A. No.

Q. Now, at the time that this letter, Intervener's Exhibit number 3, was written, was there any other power of attorney in favor of Hans Frankenberg in effect with respect to your bank? A. If the question is put in that general way, I cannot answer it, because it is possible that other lessees of deposit boxes may have had Dr. Frankenberg appointed as attorney-in-fact.

Q. My question is only directed to safe deposit box number 1923. A. In that case, no other power of attorney.

Q. I believe you testified, Dr. Hegetschweiler, that Intervener's Exhibit number 4 shows that someone entered the box on July 11, 1933. Is that correct? A. Yes.

Q. And I believe you further testified that this document, Intervener's Exhibit number 4, shows by the entry thereon that it was Dr. Frankenberg who had access to the box on that date, and that he had access under this special power of attorney, which is Intervener's Exhibit number 3. Is there anything on Exhibit 4 which shows that the entry by Dr. Frankenberg on the 11th of July, 1933, was pursuant to the letter of June 26, 1933, Exhibit number 3? A. There is a notation under that date saying: pursuant to the special power of attorney in the letter, what probably means envelope, for Dr. Hans Frankenberg.

Q. Dr. Hegetschweiler, I believe you testified that in addition to this control card, I guess you called it, the bank has other cards which show who entered a particular safe deposit box on a specific day. Is that correct? A. Yes.

Q. I believe you also said that those cards were bound up in some fashion. Is that correct? A. Yes.

Q. Just how are they bound? A. Unfortunately, I am not a specialist in the art of bookbinding, but it is done in the form of a book.

Q. In other words, if I understand you right, Dr. Hegetschweiler, these cards once they are bound cannot be detached without destroying the binding of the book. Is that correct? A. That is right.

Q. Are these cards bound together by a certain number of days or by box number? A. By date, by a certain number of days.

Q. So just that I get the picture clearer in my mind. Is there a separate card for each entry into the box? A. Yes, so that for these eight openings (pointing to Intervener's Exhibit number 4), there are eight separate cards.

Q. And these cards are filed in such a way that, for example, if on August 20 twenty people came to your bank to open twenty different safe deposit boxes, those cards would all be together under the date of August 20? A. Yes.

Q. I believe, you testified, Dr. Hegetschweiler, that if the lessee of a safe deposit box did not have the key, the bank would employ a locksmith to open the box. Is that correct? A. That is right.

Q. Would you destroy the lock and require the issuance of new keys? A. Yes.

Q. Do you have any knowledge whether that happened with respect to safe deposit box number 1923? A. Yes, March 4, 1946, by the Swiss Compensation Office.

Q. I believe you also testified, Dr. Hegetschweiler, that mere possession of the key alone by someone other than the owner of the safe deposit box would not give him a right of access. Is that right? A. Yes.

Q. What would be the result if a man who is holding a valid and existing power of attorney comes to the bank without a key and wants to get in the box? A. This question would have to be decided on its merits from one case to another, of course. We would not permit the attorney in fact in every case to open the safe deposit box by force.

Q. What would be the basis of distinction? A. That is hard to say. One would try to establish the presumable desire of the lessee.

Q. Now, Dr. Hegetschweiler, I ask you to state who is the lessee of safe deposit box number 1917? A. It was a third party.

Q. My question was: what is the name of that party? A. I cannot divulge the name.

Q. I assume, when you say you cannot divulge the name you are referring to the prohibition of Swiss law? A. Yes.

Q. I ask you, Dr. Hegetschweiler, is there any safe deposit box in the Credit Suisse leased to Adler & Co.? A. I cannot answer this question either.

Q. Was there any safe deposit box in your bank leased to Hans Frankenberg? A. I don't know. I don't know and I could not say it either.

Q. Isn't it a fact, Dr. Hegetschweiler, that the only records of the bank you have examined are relative to safe deposit box number 1917 and 1923? A. Yes, in this connection.

Q. So that even if you could testify you would have no knowledge who would happen to be the lessee of any other safe deposit boxes in the bank? A. That is right.

Q. Just one or two more questions, Dr. Hegetschweiler. In your preliminary statement you said that you came here of your own accord and for no other reason than to be of assistance to your client, Mr. Fritz von Opel. Is that correct? A. Yes.

Q. And under the banking laws of Switzerland you are not allowed to testify about a customer's accounts or affairs unless you have his consent. Isn't that true? A. Yes, in principle.

Intervener's Exhibit 18 for Identification

Deposition of Rudolf Hegetschweiler—Cross

Q. And since Mr. Fritz von Opel asked you to come here and testify you, of course, feel that you have his consent? A. Yes.

Q. If you have the consent of your client concerning his affairs, is it permissible under Swiss law for you to take the records of the bank pertaining to his account outside of Switzerland?

> Mr. Ennis: I object to this question as being irrelevant and immaterial.

A. Insofar as such records actually and in fact only concern that particular client and do not relate to or endanger the interests of any third parties, it is in principle permissible to take such records along.

Q. Now, Dr. Hegetschweiler, you know, do you not, that I am an attorney in the United States Government and, therefore, a representative of the United States Government. Is that correct? A. Yes.

Q. Is it not a criminal offense under the laws of Switzerland for you to divulge information as to economic matters to a representative of a foreign government?

> Mr. Ennis: I object to the question as being irrelevant, immaterial and incompetent.

A. I don't believe that in this case I come under any criminal statutes, otherwise I would not have come here.

Q. Isn't your testimony today before a representative of the United States Government a violation of Article 273 of the Swiss Penal Code?

> Mr. Ennis: I object to the question as being irrelevant, immaterial and incompetent.

A. No, but this is a legal question.

Q. You are a lawyer, Dr. Hegetschweiler, are you not? A. But I cannot testify in legal matters.

Q. Do you mean by that answer that you are not familiar with the Swiss Penal Code? A. No, what I want to say was that being bound to tell the truth, I can of course not say whether certain conduct on my part falls under a certain section of the Penal Code. Of course, I am convinced that what is concerned here does not come under such statute.

Q. Dr. Hegetschweiler, in the course of your testimony and in answer to some of Mr. Ennis's questions, you referred to a card which seems to be similar to Intervener's Exhibit number 4. Can you please tell us what that card is? A. That is a continuation.

Q. May I see it please? A. Yes.

Q. Calling your attention once more to Intervener's Exhibit 4, Dr. Hegetschweiler, can you please explain the very last entry in the right hand column on the front side of that card? A. On May 16, 1936, notification sent to Dr. Hans Frankenberg, c/o Adler & Co. through one of our officials.

Q. Can you tell us what kind of a notification that was, Dr. Hegetschweiler, which was sent to Dr. Frankenberg? A. I presume that it was a notification to the effect that the rental on the safe deposit box was due.

Q. Is it not correct, Dr. Hegetschweiler, that the next to the last column on the right hand side of the card is a column showing how the rent for the box was paid to the bank? A. That is right.

Q. And is it not true, Dr. Hegetschweiler, that from

August 1, 1935 and through the succeeding years the rent was paid by Adler & Co.? A. Yes.

Mr. Baum: No further questions, thank you.

Redirect Examination of the Witness by Counsel for Intervener Fritz von Opel

By Mr. Ennis:

Q. Dr. Hegetschweiler, were these entries on this card, Intervener's Exhibit number 4, made in the regular course of the bank's business? A. Yes.

Q. Did Mr. Fritz von Opel have any other box in your bank?

> Mr. Baum: I object to this question on the ground that the witness has already testified that he has only looked at the records concerning safe deposit boxes number 1917 and 1923.

Q. Did Mr. Fritz von Opel have any other box, can you answer that? A. As far as I know, he had not.

Mr. Ennis: Thank you, Dr. Hegetschweiler.

Recross Examination of the Witness by Counsel for the Defendants

Mr. Baum: Let me ask one more question.

Q. Are the documents known as Intervener's Exhibits number 1, 2, 3, and 4, the only records of the bank pertaining to box number 1923, aside from the control cards which you said you cannot produce? A. There are additional records.

Q. What is the nature of those records? A. Copies of those notices, that is to say notices concerning rentals due and debit advises.

Q. And aside from what you have just mentioned are there any other records pertaining to this safe deposit box? A. So far as I know, there are not.

Q. Before you came here, Dr. Hegetschweiler, did you look whether there were any other documents pertaining to this box? A. Yes.

Mr. Baum: No further questions, that is all, thank you.

There being no further questions, the witness was excused and withdrew at 4:00 p.m., August 19, 1954.

* * * * *

(Hegetschweiler Deposition—Exhibit 1 printed at p. 830a)

Intervener's Exhibit 18 for Identification

(Hegetschweiler Deposition—Exhibit 2)

POWER OF ATTORNEY

The undersigned as lessor of safe deposit box No. 1923 of the Swiss Kredit Anstalt in Zurich herein provides Dr. Hanns Frankenberg and Mr. Adolf Gaeng but jointly only with a power of attorney during the entire existence of the lease to act in the place of the undersigned as he himself would do with safe deposit box 1923 and in the same manner to legalize disposition of the contents thereof which is placed at their disposal. The Swiss Kredit Anstalt is empowered to open the above mentioned safe deposit box for the holders of the powers of attorney at their will and to take control of the contents.

The power of attorney exists until its written revocation is received at the Swiss Kredit Anstalt; if this event does not occur it is expressly stated that the authority of the holders of the power of attorney does not cease but continues to exist in the event of the death or the incapacity of the lessor.

Zurich, April 18, 1934

The Authorized

/s/ Hanns Frankenberg

Adolf Gaeng

The Grantor

/s/ Fritz von Opel

Intervener's Exhibit 18 for Identification

(Hegetschweiler Deposition—Exhibit 3)

Berlin-Charl. Bismarckstr. 33

June 26, 1933

To the
Swiss Kredit Anstalt
Zurich

(corrected
signature
illegible)

The undersigned as lessor of safe deposit box No. ~~1932~~ *1923* hereby gives Dr. Hans Frankenberg, Zurich, the right to remove the safe containing shares of Oversees Finance Corporation and to return them after the necessary stamps have been affixed.

/s/ Fritz von Opel

Italics indicate handwritten correction.

Intervener's Exhibit 18 for Identification

(Dr. Eugen Meier Deposition)

September 2, 1953
11.10 a.m.

Dr. Eugen Meier a witness, was called, and having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ennis:

Q. Will you state your full name, address and present occupation? A. Eugen Meier, Doctor in Law, attorney, retired. I am working in several companies.

Q. Address? A. Liestal, 5 Seltisbergerstrasse.

Q. Are you the Dr. Meier who testified in the District Court in the Overseas case in January 1949? A. I am the man.

Q. Were you President of the Administrative Board of Overseas? A. Yes.

Q. During what years? A. From May 1932 until today.

Q. In 1940 who were the other members of the Administrative Board? A. In 1940 there were besides me, Dr. Hans Frankenberg and Dr. Joseph Henggeler.

Q. Was any one memebr of the Administrative Board at that time authorized to act for the Corporation? A. Do you mean within the Administrative Board or outside the Administrative Board?

Q. I mean to take any action on behalf of the representation with respect to third parties. A. For representing the Corporation outside the Administrative Board, the signature of two members of the Board was required. We called this the collective signature.

Q. Do you recall when in 1940 Dr. Frankenberg went to the United States? A. I cannot give the exact date but it must have been about the 10th of May.

Q. Before Dr. Frankenberg's departure was the work on behalf of the Corporation divided among the members of the Administrative Board? A. Without that there was a formal partition with regard to the work among the members of the Administrative Board, it worked out practically this way. Dr. Frankenberg attended to the banking transactions, the sale and purchase of securities, and he granted loans. An essential part of his work was the transaction with the banking firm of Adler, which was the bank of the Corporation. I think it is a fact which is known that Dr. Frankenberg at the same time was also a member of the Administrative Board of Adler and Company.

Q. What did the other members of the Board do? A. Dr. Henggeler was, so to say, the consulting lawyer of the Corporation. This was just a factual situation without having a legal appointment thereto.

Q. And what did you do? A. I was the President of the Administrative Board, and in such capacity I had under my supervision the tax affairs and liaison with the commercial register authorities, with the resident register authorities and with the authorities in general. May I explain that? This was by an internal division of work, but to the outside world this Administrative Board was always acting jointly.

Q. As President of the Administrative Board, did you have any special duties? A. The Administrative Board as a whole is responsible for the accounting, that there are the meetings of the shareholders, the general meetings; and within the Administrative Board, the President would always be the moving factor. There must be somebody who takes care of everything.

Q. Under Swiss corporate practice, were you elected to the position of President by the stockholders, or appointed by the Administrative Board? A. I was elected by a general meeting.

Q. After Dr. Frankenberg went to the United States, did your work on behalf of the Corporation increase? A. Yes, not my duties maybe, but my activity increased.

Q. In what respect? A. Formerly there have been the three of us dividing up the work among us, and now there had been left only two.

Q. Will you state some of the activities you engaged in in behalf of the Corporation after Dr. Frankenberg's departure in 1940? A. The situation was this: that the assets were blocked a short time thereafter. Due to the blocking of the assets no substantial transactions could be carried out any more. On the other hand, the Corporation had to see to it that care was taken of the preservation of the assets. This all required a number of meetings and measures. One of the difficulties was financial, that we had no money any more. Nevertheless, we were required to meet the expenses, taxes, interest, administrative costs. It is true that the members of the Administrative Board did not get any fees any more from 1943 on.

Q. During this period after 1940 as President of the Administrative Board, did you manage the affairs of the Corporation? A. Yes.

Q. Did you receive any communication from Dr. Frankenberg in America concerning the management of the Corporation? A. No. On the other hand, Dr. Henggeler was working together with me, was assisting me in my work.

Q. And of course, during this period after Dr. Frankenberg's departure, he attended no annual meetings and no meetings of the Administrative Board? A. No.

Q. In his absence in America did Dr. Frankenberg participate in the management of the Corporation's affairs so far as you know? A. No.

Q. Was Dr. Frankenberg ever appointed as Managing Director of Overseas? A. No. There was only this division of work which resulted from the factual situation which I already have described before.

Q. Did Dr. Frankenberg or anyone else ever tell you that Dr. Frankenberg was acting as agent for Wilhelm Von Opel in his conduct of Overseas affairs? A. No.

Q. Dr. Meier, I show you Intervener's Exhibit 3. Have you examined that particular document before? A. Yes.

Q. Is it a copy of a contract made by Overseas with Frima? A. This is not a copy, but a carbon copy.

Q. Do you know where the original is? A. One original will be with Frima and another original will be with the file copy we sent to Washington. The contract was drawn by Dr. Henggeler. I can identify this by this file number.

Q. Is the contract still in effect? A. The contract is still effective at this time. It was never abrogated.

Q. That contract refers to the indebtedness of Overseas to Frima, does it not? A. Yes.

Q. Do you know, Dr. Meier, what the present indebtedness of Overseas to Frima is?

> Mr. Baum: I will object to that question on the ground that the books of the Corporation are the best evidence of the indebtedness.

A. Not from memory—I had to look up this from the balance sheet—approximately nine million francs.

Q. In 1936 were you President of the Administrative Board of Adler and Company? A. Yes.

Q. Do you recall the deposit of 97 bearer shares of Overseas made by Frima with Adler for Frima's account in 1936?

> Mr. Baum: I will object to that question as leading the witness and suggesting the answer.

Q. Did Frima deposit any shares of Overseas with Adler in that year, 1936?

> Mr. Baum: I will object to that question on the ground that there has been no testimony that this witness is an officer or in any way connected with Frima, or would have any knowledge of the affairs of Frima.

A. Yes. Already before this year 1936 there had been deposited three shares of 5,000 francs each. These were the qualifying shares of the members of the Administrative Board. Then on the 30th of May, 1936, then Frima deposited 97 shares, shares no. 1 through 97 at 5,000 francs each. This completed the deposit of capital stock.

Q. For whose account did Adler and Company hold the 97 shares?

> Mr. Baum: I will object to that question on the ground that the records of Adler are the best evidence as to the person for whose account these shares were held.

A. For Frima.

Q. Have you examined the records of Adler in this respect? A. Yes, during these last days.

Q. Was Adler and Company advised by Frima or anyone else that the 97 shares held by Adler for account of Frima were subject to usufruct for Wilhelm Von Opel or anyone else?

Mr. Baum: Same objection.

A. No.

Q. Do you recall the transfer of these shares by Adler and Company to Union Bank of Switzerland in 1936 when Frima sold the shares?

Mr. Baum: I will object to that question as leading the witness.

Q. Were these 97 shares transferred by Adler and Company to anyone else in 1936? A. Yes.

Q. To whom? A. To the Union Bank of Switzerland at Zurich for Frima of Vaduz. That was on the 22d of June, 1936.

Q. Did Adler and Company advise Union Bank of Switzerland that these 97 shares were subject to any usufruct? A. No.

Q. Did these 97 shares ever again come into the possession of Adler and Company? A. Yes.

Q. When? A. On the 4th day of November, 1941.

Q. For whose account did Adler hold them?

> Mr. Baum: I will object to that question on the ground that the records of Adler and Company are the best evidence of for whose account they were held.

A. For Frima.

Q. Have you examined the records of Adler to determine your answer? A. Yes, for the purpose of giving this answer. On another occasion I already have given a statement with regard to this matter, also after having looked into the records. As I anticipated that I would be asked this question I once more made sure of it. How else could I answer this question if I had never looked into the file?

Q. Were you President of the Administrative Board of Adler and Company at that time in 1941? A. Yes, since 1930, I believe, or 1931.

Q. Do you occupy that position at the present time? A. Yes.

Q. As President of the Administrative Board of Overseas from 1936 on, did you preside at the annual meetings of shareholders? A. Whenever I was present. It is possible that I have not attended all the meetings, that I skipped one or the other.

Q. Did you preside at annual meetings after the 97 shares were repurchased by Frima in 1941?

> Mr. Baum: Just a moment. I will have to object to that question. There is no evidence and no testimony by this witness that the shares were repurchased in 1941.

Q. Did you preside at annual meetings after the 97 shares were redeposited with Adler and Company for account of

Frima in 1941? A. Yes, but it is possible that I might have been sick. It might have happened.

Q. But did you preside over some meetings between 1942 and the present time? A. I was always present.

Q. What person attended the meeting and voted these 97 shares of Frima?

Mr. Baum: I will object to that question on the ground that the minutes of the annual meeting are the best evidence of who attended, who voted, and who voted the shares represented at the respective meetings.

A. When?

Q. Beginning with the first annual meeting after the shares were redeposited in Adler and Company in November 1941. A. From 1941 on after they had been returned, from 1941 on the shares were always represented by Mr. Gaeng.

Q. Did Fritz Von Opel participate in the business affairs of Overseas before he went to the United States in 1940? A. Yes.

Q. In what manner? A. He was the man, he was the Corporation. He had the disposition of it. It was a one man corporation.

Q. Did he advise the Administrative Board of the actions he wished to be taken by the Corporation? A. He did not only act in an advisory capacity, but gave directives. Nothing was done without the explicit will of Fritz Von Opel.

Q. Were you as President of the Administrative Board of Overseas ever advised of the existence of any usufruct on Overseas monetary obligation to Frima? A. No.

Mr. Ennis: No further questions.

Intervener's Exhibit 18 for Identification

Deposition of Dr. Eugen Meier—Cross

Cross Examination by Mr. Baum:

Q. Dr. Meier, were you as President of the Administrative Board of Ubersee Finance Corporation ever advised of any usufruct in favor of Wilhelm Von Opel on the 97 shares of Ubersee? A. As to the 97 shares, no.

Q. Were you ever advised of the existence of a usufruct on any of the shares of Ubersee Finance Corporation? A. I have not been advised. I got to know for the first time of a usufruct in Washington in 1935.

Q. And it was Fritz Von Opel who told you; was it not? A. It was Fritz Von Opel who told me this.

Q. And is it not true that he told you all of the shares of Ubersee were subject to a usufruct in favor of his father? A. The conversation was about property generally but not of making a distinction between particular parts of the property.

Q. Do you recall signing an affidavit on behalf of Ubersee Finance Corporation on May 28, 1935? A. I do recall that I signed an affidavit, but whether or not this was on the 28th of May, 1935, I don't know. I only know that I signed such a document.

Q. Didn't you state in that affidavit as follows: "On May 14, 1935 I heard Mr. Fritz Von Opel say that he was the owner of substantially all the stock of said Corporation, subject to the right of usufruct reserved in his father, Wilhelm Von Opel"? A. I made such statement. It was then, if it was the 14th of May, that I heard for the first time that there was such a usufruct.

Q. Now, Dr. Meier, you testified about the internal division of responsibility among the members of the Administrative Board of Ubersee, and in that testimony you said that Dr. Frankenberg handled the banking transactions, the purchase and sale of securities and the granting of loans. Who did Ubersee lend money to? A. I cannot state it from memory. There appear the names of the debtors from the balance sheet.

Q. When you referred to "loans" isn't it true that what you really meant is that Ubersee was for the most part borrowing money? A. Yes, from Frima. This is a large credit sum.

Q. And from Adler and Company too? A. I have to look this up from the record, but it was already established at the trial of the case in Washington that Ubersee was indebted up to the amount of 88,000 francs or dollars—I don't know—and on the other hand they had a credit balance of 200,000 francs.

Q. That was as of 1949; isn't that correct? A. Very probably, but I cannot state it.

Q. Well, the accounts between Adler and Ubersee changed from time to time, did they not, over the years? A. Formerly yes, but not during the last period of time.

Q. Dr. Meier, when you testified in Washington at the trial of this case, do you remember being asked the following question and giving the following answer: "Question: In other words, up until 1940, Frankenberg ran the Company; isn't that true? Answer: Administratively speaking, yes. The technical and financial management was in the hands of Fritz Von Opel"? A. Yes.

Q. And do you remember being asked the following question and giving the following answer: "Question: Frankenberg was, in the years 1932 through 1935 inclusive, the Managing Director, wasn't he? Answer: Managing Director is not correct. He was that member of the Administrative Board that managed the affairs of the Company"? A.

Yes, in the way I have answered this question this morning, that the business of the Corporation consisted in banking transactions, and that Dr. Frankenberg had these under his supervision.

Q. And did you not say in your affidavit of 1935, "Dr. Frankenberg is and has been since 1932 in effect Managing Director of said Corporation, conducting substantially all its affairs, subject to the advice and consent of the other two Directors"? A. Yes, always taking into consideration the restriction I already have pointed out before, that this was the factual situation, but not a legal one.

Q. Now, Dr. Meier, you said that shortly after Dr. Frankenberg went to America in 1940 the assets of Ubersee were blocked; is that not correct? A. A short time thereafter. I cannot state the exact time.

Q. By that statement did you mean the assets of the Corporation in the United States? A. Yes, that too.

Q. What other assets of Ubersee Finance Corporation were blocked shortly after 1940? A. The coconut plantation in Tanganyika. The house located at St. Moritz was only blocked on the 16th of February, 1945.

Q. Wasn't the coconut plantation in Tanganyika released by the British Government in 1939 or 1940? A. No. The coconut plantation was only released in 1948 or 1949 or 1950, in any case, a long time after the war.

Q. In 1940 was it not true that at least 90% of the assets of Ubersee Finance Corporation were represented by the assets then held in the United States? A. The part which was blocked.

Q. No, all the property in the United States. A. I don't understand the question.

Q. In other words, Dr. Meier, is it not true that apart from the assets which Ubersee held in the United States, the other assets of the Corporation represented only a minor portion of the total? A. Yes, about 5%, the house and the coconut plantation.

Q. And the stock of Trans-Danubia Bauxite also; is that not true? A. Yes.

Q. And the assets which Ubersee had in the United States were for the most part shares of stock in Harvard Brewing Company, Spur Distributing Company and Hurricane Petroleum Company; were they not? A. Yes, these were the essential assets.

Q. And who on behalf of Ubersee after Dr. Frankenberg came to the United States in 1940 handled Ubersee's interest in those companies? A. As far as I assume, Mr. Fritz Von Opel.

Q. In whose name were the shares of stock of those companies owned by Ubersee registered? A. Were these nominal shares?

Q. Is it not true, Dr. Meier, that the shares of stock of Harvard, Spur and Hurricane were registered in the name of Hans Frankenberg and Adolf Gaeng? A. It is not known to me. In the records they are registered under the name of Ubersee. It is for the first time that I hear that they had been registered under a different name for the public.

Q. I believe you said, Dr. Meier, that after Dr. Frankenberg went to the United States in 1940 you never heard from him again; is that correct? A. Of course I heard of him at Adler's, but I didn't know anything that he was working or had been working for Ubersee.

Q. Did he communicate with Adler and Company while he was in the United States? A. Yes.

Q. And in fact you know, do you not, that his office in New York was with a company known as Anhold & S. Bleichroeder? A. Yes.

Q. And is it not true that the same people who owned Adler and Company owned Anhold and S. Bleichroeder? A. Yes.

Q. Have you had any discussions with him since he has been in Switzerland concerning the affairs of Ubersee Finance Corporation? A. Yes.

Q. Have you had any discussions with Dr. Frankenberg since he came back to Switzerland concerning the affairs of Ubersee Finance Corporation since 1940? A. We talked about the present situation of the Corporation, what had to be done, as to the measures we had to take.

Q. And in your conversations with Dr. Frankenberg, did he tell you what he had done on behalf of Ubersee while he was in the United States? A. He didn't tell me what he had been doing, but he told me that this had been for him a very unpleasant affair. This was the way in which he expressed himself.

Q. And did Dr. Frankenberg tell you after you saw him again in Switzerland that in the year 1940 he and Mr. Fritz Von Opel had gone to Shreveport to clean up their difficulties there? A. No.

Q. Is it not true, Dr. Meier, that Ubersee lost a considerable sum of money in the oil well properties it had in Louisiana? A. Yes.

Q. And didn't the Hurricane Petroleum Company go into bankruptcy in the year 1940 or 1941? A. Yes.

Q. And wasn't a new company formed as a result of that bankruptcy, known as Amerlagene? A. Yes, this name is known to me.

Q. And was not all of the stock of that Company owned by Ubersee Finance Corporation? A. I couldn't say this.

Q. Dr. Meier, I show you a photostatic copy of a document which has been marked Defendant's Exhibit 70 in this case, labeled "Inventurenbuch", and ask you to look at the inventory as of December 31, 1941 under Item 6. I ask you whether or not 100 shares of Amerlagene is not listed therein as an asset of Ubersee. A. Yes. If I am not mistaken this Amerlagene appears also under the Liability. It is also here in the Liability in the amount of 21,500 francs.

Q. Is it not true, Dr. Meier, that the Company known as Amerlagene was organized by Dr. Frankenberg and Anhold & S. Bleichroeder? A. Not known to me.

Q. And isn't it true that this Corporation was organized after the bankruptcy of Hurricane Petroleum Company? A. Not known to me.

Q. Directing your attention to Intervener's Exhibit 3, Dr. Meier, who on behalf of Ubersee signed the original of that contract? A. I presume, but I don't know it, that Dr. Henggeler and Dr. Frankenberg did it, but it is also possible that I signed it myself.

Q. And who on behalf of Frima signed that agreement? A. Mr. Gaeng. Nobody else could sign in lieu of him.

Q. I believe you testified, Dr. Meier, that after 1940 Dr. Frankenberg did not attend any meetings of the stockholders of Ubersee; is that correct? A. Yes, he attended one general meeting of Ubersee in 1952, that is after he had returned, the last meeting he attended before he died.

Q. And until he died he was still a member of the Administrative Board of Ubersee; was he not? A. Yes.

Q. I believe you also testified, Dr. Meier, that after the shares of Ubersee came back to Adler and Company in 1941 they were represented and voted at the meetings by Mr. Gaeng; is that correct? A. I would have to look into the files. It is possible that Dr. Frankenberg and Dr. Henggeler—as to my recollection, nobody else represented the shares of Frima than Mr. Gaeng.

Q. Is it not true, Dr. Meier, that the Articles of Incorporation of Ubersee provide that no one stockholder at a meeting is entitled to represent more than 20 votes? A. These were the former Articles which however were amended.

Q. When? A. Probably in 1947, but for the rest, this doesn't mean that they might have been represented by somebody, only there could not have been any voting for them. I don't want to be misunderstood, that somebody should take this in order to corner me. I said that Mr. Gaeng has represented 97 shares, but that must be amended by saying that he couldn't vote more than 20 shares. The remaining shares just could not be voted.

Q. Who on behalf of Ubersee Finance Corporation voted the stock of Spur Distributing Company after 1940? A. Probably the Alien Property Custodian.

Q. The Alien Property Custodian did not acquire those shares until 1942; isn't that correct? A. From the time on when the shares had been blocked or seized they were represented by the Alien Custodian.

Q. And before they were seized, who represented them in the United States after 1940? A. I presume Mr. Fritz Von Opel, but I do not know it.

Q. Could it have been Dr. Frankenberg? A. I don't know it. It is possible.

Q. Did you ever hear the name August Ulrich? A. I have heard this name, and I think I once received an inquiry from some authority, but I had to answer that I did not know this man.

Q. Was not August Ulrich the standing representative in the United States of Ubersee Finance Corporation? A. I don't recall.

Q. Was he not President of the Hurricane Petroleum Company? A. It is not known to me.

Q. As far as you know then, Dr. Meier, you have no knowledge of what was done with the shares of Harvard, Hurricane and Spur between 1940 and 1942? A. I don't know it.

Q. In the years between 1940 and 1942 then you did not have any increased activities on behalf of Ubersee Finance Corporation with respect to its property in the United States, did you? A. No.

Q. So that when you spoke of an increase in your activities after 1940 you were referring to activities only in Switzerland? A. In Switzerland.

Q. And how long did Dr. Frankenberg stay in the United States after 1940? A. I think he came for the first time back to Switzerland, if I am not mistaken, in 1945 or 1946, but he always only made a temporary stay in Switzerland. He did not take up residence there.

Mr. Baum: No further questions.
Mr. Ennis: No further questions.

Intervener's Exhibit 18 for Identification

(Adolf Gaeng Deposition)

September 2, 1953

Mr. Adolf Gaeng a witness was called, and having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ennis:

Q. Will you state your full name, your address, and your occupation? A. Adolf Gaeng, Zuerich 37, Rebbergstrasse 21, bookkeeping expert, retired.

Q. Is that the equivalent of an accountant in the United States, if you know? A. Yes, it is.

Q. What is your position in the Overseas Corporation? A. From 1924 until 31 December 1942, I was a comptroller.

Q. And after 1942? A. A member of the administrative board.

Q. Are you at the present time a member of the administrative board? A. No.

Q. When did you stop being a member of the administrative board? A. On 31 December 1952.

Q. As comptroller or member of the board were you ever informed that any shares of Overseas were burdened with a usufruct in favour of Wilhelm von Opel or anyone else? A. No.

Q. Did you ever meet Wilhelm von Opel? A. I met Wilhelm von Opel once just by chance on the street, at the utmost for 4 or 5 minutes.

Q. Who introduced you to Wilhelm von Opel? A. I just met him on the street by chance.

Q. With whom? A. He was in the company of Mr. Fritz von Opel on the street.

Q. Do you remember about what year that was? A.

Maybe it was between 1930 and a later date. I don't know it any more for sure.

Q. Where was it? A. It was in front of the building of the Union Bank of Switzerland, Bahnhofstrasse, Zuerich.

Q. Did Dr. Frankenberg ever tell you that, as a member of the administrative board of Overseas, he was acting as agent for Wilhelm von Opel? A. No.

Q. Did anyone else ever tell you that? A. No.

Q. Did Dr. Frankenberg ever state to you for whom he was acting as a member of the board of Overseas? A. Yes. He was acting for Mr. Fritz von Opel and for the rest of the banking house customers.

Q. What banks? A. Several banks. I don't know, this is a confidential matter.

Q. In Dr. Frankenberg's activities for Overseas, did he ever say that, as a member of the board of Overseas, he was acting for anyone other than Fritz von Opel? A. No. He was only acting for Fritz von Opel, and the rest of the customers.

Q. Do you mean he had other customers outside of Fritz von Opel in his own affairs outside the Overseas Corporation? A. Yes, I presume that he had also other customers. He could not have become a rich man from Opel alone.

Q. Did you ever have any conversation with Dr. Frankenberg about a particular investment by Overseas in the United States of approximately Sfrs. 500,000? A. Yes.

Q. When? A. Yes, but I don't recall the date any more.

Q. About what year? A. May be 1932, 1933 or 1934, I don't recall. I am sorry I cannot tell you how it was.

Q. Do you recall the substance of the conversation? A. Yes. I had, so to say, a feeling in the tip of my fingers that something was wrong with the Hurricane Company.

Q. Was this conversation about the Hurricane Company? A. Yes. It was about a payment to the Hurricane Company.

Q. What did Dr. Frankenberg say? A. Dr. Frankenberg said, "Mr. Gaeng, I am not confident of this matter myself, but Mr. von Opel wants to make the payment.

Q. Fritz von Opel? A. Yes, I always refer to Mr. Fritz von Opel.

Q. What did you say to Dr. Frankenberg? A. Well, there I can't do anything, if he wants to give his money to these people, it is his business.

Q. Did you express an opinion as to whether it was a good investment? A. Well, no, no, I said, I considered the matter a dubious one, and he should not make the payment because there would be a bankruptcy.

Q. Did Dr. Frankenberg express to you his personal opinion of the wisdom of the investment? A. As I already have stated, he said, I have the same feeling, but Mr. Fritz von Opel wants to make the payment.

Q. Mr. Fritz von Opel? A. Yes.

Q. Did you vote all or some of the shares of the Uebersee Company at the stockholders' annual meetings? A. Partly for part of them, as long as I was with Frima.

Q. As a comptroller of Overseas, do you know whether at any time any of its shares of stock were transferred to Frima? A. This was not a matter which concerned me in my capacity as comptroller, this was a matter which concerned the administrative board.

Q. Were you an officer of Frima? A. Yes. I was the sole officer of Frima.

Q. Did Frima own any shares of Uebersee Corporation? A. Yes.

Q. When did Frima acquire these shares? A. Well, this

I don't know for sure any more. This must have been at the time when Mr. von Opel came into the business.

Q. Mr. Gaeng, do you recall whether you voted any shares of Overseas at an annual meeting before Frima acquired any Overseas shares? A. Yes. I have always voted. Just a moment, please. I was a member of the administrative board from 1940, no, in 1942.

> Mr. Ennis: Mr. Gaeng, will you examine Interveners Exhibit No. 4 and also the original of which interveners exhibit no. 4 is a photostatic copy?

A. This is from Dr. Frankenberg?

Q. Do you mean it is in Dr. Frankenberg's handwriting? A. Yes, it is in the handwriting of Dr. Frankenberg.

Q. Does it contain your signature? A. Yes, Dr. Frankenberg's signature and my own signature.

Q. Do you recall having the original of this exhibit in your possession? A. Of this one here?

> Mr. Ennis: Yes.
>
> Mr. Gaeng: No, I don't recall it, I have not got it any more. The deposit with the banking house has been settled.

Q. Did you ever have this paper in your possession? A. This one?

> Mr. Ennis: Yes.
>
> Mr. Gaeng: It must have been in my possession.

Q. Where did you get it? A. This was with 99 shares without value of Vermag which already some years ago was liquidated.

Q. Mr. Gaeng, will you explain that exhibit, please? A. Yes, I have seen it.

Q. Do you recall the occasion in respect of the Overseas shares, to which that refers? A. These shares were sent to the banking house in Zug in 1936, to the Union Bank.

Q. Mr. Gaeng, will you read what it says on the exhibit about the Overseas shares? A. As to this document, the shares amounting to Sfrs. 485,000 were picked up by Adolf Gaeng and Dr. Frankenberg to be deposited with Adler & Co. for Frima.

Q. Was that on or about the date of the exhibit? A. Yes, it should have been that date, but it could be, that there is a divergence of a day or so.

Q. Where did you pick up the shares to deliver them to Adler for Frima? A. Yes, these shares were picked up from the Credit Swiss from the safe.

Q. Did you go to the safe? A. Yes, there had to be two of us to go there.

Q. Who? A. Dr. Frankenberg and I.

Q. Do you know in whose name the safe was held? A. I presume in the name of Mr. von Opel with power of attorney for us.

> Mr. Baum: I move to strike the answer, since the witness is assuming and does not know.

Q. Mr. Gaeng, I request you to examine Interveners Exhibit No. 5, [printed page 835a] and tell me whether it bears your signature? A. Yes, this is the signature of Dr. Frankenberg, and here is the signature of Adolf Gaeng, and this is Fritz von Opel, and this is the signature of some officials of the treasurer or of the safe whom I don't know.

Q. Did you go with Dr. Frankenberg to the safe deposit box to take out the Overseas shares which were delivered to Adler? A. Yes, the two of us went there.

Q. Did the officials of the bank, where the safe deposit box was located, require you to produce any identification before you were allowed to enter the room where the safe deposit box was located? A. The safe is locked with a large iron door, and in front of this safe there is a gentleman who asks you what you want, and then it is opened. One shows this power of attorney (the witness is pointing to Interveners Exhibit No. 5), then it is noted in a register that Mr. Gaeng and Dr. Frankenberg have entered the safe on such and such date. And then one goes in the company of the officials to the safe, and the 2 gentlemen went there and picked up these items.

Q. Did you also have an identification card given to you by the bank? A. Yes, this power of attorney, Interveners exhibit No. 5. And there are also small registers where the names are entered, but not every banking house would issue such register.

Q. Did the bank official to whom you referred check your copy of the power of attorney with the records of the bank? A. Yes, he checked one against the other, he is required to do this.

> Mr. Ennis: Mr. Gaeng, I request you to examine Intervener's Exhibit No. 6 and the original document of which Intervener's Exhibit No. 6 is a photostatic copy.

Q. Does that bear Fritz von Opel's signature? A. Yes, the signature of Fritz von Opel, and here again appears the same signature of the official Schmidt (witness pointing to exhibit no. 5), this is the photostatic copy of it.

Q. Mr. Gaeng, did the original of Interveners Exhibit No. 6, which you have before you, at one time come into your personal possession? A. This I don't know. This belongs Mr. von Opel, it is no matter of my concern nor of Dr. Frankenberg. May I interrupt you? I think this document (pointing to the original of Interveners Exhibit No. 6) did belong personally to Mr. von Opel before he passed it on. This is 1932.

Q. Mr. Gaeng, I show you Interveners Exhibit No. 7. Will you state what that is, if you know? A. The situation is this: These records were kept with the bank at Zug, although I am not sure of the location, in the Bank in Baden, but this is the same thing because they are two small banking houses.

Q. Is this Interveners Exhibit No. 7 a copy of a letter you wrote as administrative officer of Overseas to Adler & Co., Zurich?

Mr. Baum: I object to the question as leading.

A. Yes. I can identify this by the mistakes which appear thereon.

Q. What mistakes? A. Apparently I had written first the word "Sie" with a small instead of with a capital "S".

Q. Did you take this Interveners Exhibit No. 7 from the files of Frima? A. Yes, I used to make generally 2 or 3 carbon copies, and this certainly is one of these carbon copies. The original of this letter must be kept with the files in Washington.

Q. When you took the Overseas shares out of the safe deposit box and gave them to Adler on or about May 30, 1936, were you informed by anyone that these shares were subject to a usufruct in favour of any person? A. No.

Q. Did Frima at any time sell these shares of Overseas? A. No. The Union Bank took them, and thereafter they returned them.

Q. Is that transaction whereby Union Bank received the shares, reflected in the books of Frima?

> Mr. Baum: I object to that question on the ground that the books themselves are the best evidence of what they contain.

A. Yes, it was reflected under Frima. They belonged to Frima and not to Overseas.

Q. Do you remember the amount which was paid by the Union Bank?

> Mr. Baum: I will object to that question on the ground that it is leading, and on the further ground that there is no testimony by this witness that the Union Bank ever paid anybody any sum of money.

A. $161,000 and some cents. This is correct, Sfrs. 500,000 make $161,000.

Q. Do I understand you to testify, Mr. Gaeng, that these shares were later returned to Frima? A. Yes. They were returned in 1941. The original must be kept in Washington.

Q. After the return of the stock to Frima, do you know who voted the stock at the annual meetings of the Overseas Corporation? A. I should have voted it, but I have not with me the minutes which are in Washington. It is correct, Gaeng voted for his 97 shares, there was Frankenberg and Dr. Mayer, there were three of us. I had to vote for 98, as I was always a member of the administrative board.

Intervener's Exhibit 18 for Identification

Deposition of Adolf Gaeng—Direct

Q. Mr. Gaeng, I show you Interveners Exhibit No. 3, and I request you to examine it. Is that a copy of a contract entered into by Frima with Overseas?

> Mr. Baum: I will object to that question as leading.

A. Yes, this contract was drafted by Dr. Henggeler, this is his file sign. This was the best attorney in Switzerland.

Q. Did you sign that contract on behalf of Frima? A. Yes, I must have signed it.

> Mr. Baum: I move to strike the answer on the ground that the witness does not know.
>
> Mr. Gaeng: It is for Frima, therefore I must have signed it.

Q. You were the only officer of Frima, were you not? A. Yes, with power of attorney for signing documents.

Q. At the time of the date of this document, June 18, 1936, how much money did Overseas owe to Frima?

> Mr. Baum: I object to that question on the ground that the document speaks for itself.

A. At this time Frima did not owe any money to Overseas, but Overseas owed money to Frima.

Q. Yes, I understand, do you know how much Overseas owed to Frima? A. Sfrs. 11,027,411.90.

> Mr. Baum: Let the record show that the witness in answering the last question read from the document Interveners Exhibit No. 3.

Q. Apart from that document, Mr. Gaeng, are you able to state from your recollection approximately how much Overseas owed Frima in 1936? A. Yes, Overseas was indebted, and in this amount which appears here in this document had been found out on the basis of the accounts.

Q. As Comptroller of Overseas in 1936, are you able to state whether Overseas was in a position to pay that sum to Frima? A. Within the next five minutes. They would have been in a position to pay all that to Frima.

Q. How? Did they have that much money? A. They had a bunch of securities, bunches and bunches of securities. They would have been in a position to pay it in five minutes' time.

Q. Was Overseas, at that time, in a liquid position financially? A. Yes, yes, of course, they had the money. The Overseas should have paid this amount.

Q. Did anyone ever inform you that the obligation of Overseas to Frima was subject to an usufruct on behalf of Wilhelm von Opel, or anyone else? A. No. Just a moment. This money which appears here, was covered by these eleven millions, and nobody could pick it up without the permission of Mr. Wilhelm von Opel. You asked, whether Wilhelm von Opel could have done it, but he never could have done it.

Q. Will you please listen to the question again?— Will you now read back to Mr. Gaeng his first answer.— And will you tell me, Mr. Gaeng, whether your first answer is correct? A. Yes, the situation was this: I first stated that it could not be picked up, because this was on the credit part of Overseas.

Mr. Ennis: I don't understand the answer. Perhaps I can get it explained by another question.

Q. Did Wilhelm von Opel have any interest whatever in the assets of Frima? A. He had no interest therein, it was no matter of his concern.

Mr. Ennis: No further questions.

Cross Examination by Mr. Baum:

Q. Mr. Gaeng, will you please explain why, in answer to Mr. Ennis's question, you stated that nobody could withdraw these 11 million Francs indebtedness without Wilhelm von Opel? A. This was a mistake on my part, he could not remove it for the reason that it was not on his credit part.

Q. On the books of Overseas Financial Corporation, this sum of eleven million Francs appears as a debit, did it not? A. Yes. Just a moment. This was an administration account of Mr. von Opel. It had nothing to do on which he had a credit of eleven million Francs, and which had nothing to do with Overseas.

Q. The books of Overseas show, do they not, that this money was paid in to Overseas, is this not correct? A. It must appear on the administration account of Frima.

Q. As a credit in favour of Frima, is that not right? A. Yes, no, wait, let me think, that belonged to the administration account of Frima.

Q. And as of the date of that document, Interveners Exhibit No. 3, Overseas owed that amount according to its books to Frima, did it not? A. No, that is how it is. The Overseas was binding itself by this document that, in case that the amount would be lost, it was indebted to Frima for this amount.

Q. In other words, this is a surety agreement, and in 1936 you were in charge of keeping the books of Overseas Finance Corporation, were you not? A. I was in charge of the accounting all the time from 1922 until the end.

Q. At any time did anybody ever tell you that this account was set up on the books of Overseas Finance Corporation, so that Wilhelm von Opel could tell the German Government that he could not get it? A. Yes, wait a moment. If it had been to his credit, then he could have obtained it.

Q. Mr. Gaeng, you are familiar with accounting practices, are you not? A. Yes.

Q. What, in accounting practice, does the word "consortium" mean? A. Yes, formerly the situation was this. Formerly there was an American consortium, that was at a former period of time.

Q. Mr. Gaeng, I did not ask you for any specific account, I merely asked you what in accounting practice the word "consortium" means, in any accounting books? A. The word "consortium" means "association".

Q. Does it mean a group of people? A. I don't know.

Q. Did you ever use it that way? A. Yes, if it appears in the books.

Q. Mr. Gaeng, this power of attorney, Interveners Exhibit No. 5, which was shown you, was the original of that power of attorney filed with the bank named therein? A. This power of attorney must have been kept with the banking house Credit Swiss. Just a moment. No, this must have been kept either by Dr. Frankenberg or by myself, because upon presentation of these we could enter the safe of the Credit Swiss.

Q. In other words, Mr. Gaeng, every time you wanted to go to the safe deposit box, you and Mr. Frankenberg had to show the bank official this power of attorney? A. Yes, otherwise they would not have opened to us.

Q. I now call your attention to Interveners Exhibit No. 6, and ask you to state, whether or not it is correct that that is a lease of a safe deposit box for one year, beginning April 2, 1932. A. This is correct, but very probably this was a private matter.

Q. Do you know of your own knowledge, whether this lease was renewed at the end of one year. A. I don't know it.

Q. Now this document, which is marked Interveners Exhibit No. 4, in addition to shares of Overseas, it also refers to some securities of Spur stock and Oil Refinery stock, does it not? A. Yes, it does. These were without value.

Q. And these securities of Spur and Oil Refinery were assets of Overseas Finance Corporation, were they not? A. No, these were not without value, these were not the ones which I had picked up thereafter, these had a value.

Q. Were they the property of Overseas Finance Corporation? A. Yes, they were supposed to be, but I cannot make a definite assertion.

Q. Where was the original of this document, Interveners Exhibit No. 4, kept? A. Please ask for the register of the documents from the accounting board of the Credit Swiss. They needed this document.

Mr. Baum: I think we can save time if I can ask counsel for the intervener where the original of this document came from.

Mr. Ennis: The original of this exhibit was in the safe deposit box of the Credit Swiss up to the time the box was cancelled, about two years ago, and at that time with the other papers in the box was sent either to Mr. Gaeng or Dr. Meier.

Q. Mr. Gaeng, referring again to Interveners Exhibit No. 4, would you say that this document is part of the records of Overseas Finance Corporation? A. Here there is a tax book referring to the turnover tax in which everything is noted, and this is kept with the other documents in Washington.

Q. Was this document sent to Washington? A. I don't know.

Q. You had something to do with sending the documents to Washington in 1948, had you not? A. Yes.

Q. And you understood, did you not, that you were to send all the records of Overseas? A. All books and all documents.

Q. Mr. Gaeng, Interveners Exhibits No. 5 and 6, both refer to a safe deposit box No. 1923, do they not? A. Yes.

Q. Is there anything on Interveners Exhibit No. 4 which states where the Frs. 485,000 of Overseas shares came from? A. Yes, these were the shares of the joint stock corporation which was founded in .

Q. Does it say on Interveners Exhibit No. 4 that these shares were taken out of box No. 1923? A. Well, the number of the safe does not appear.

Q. Did you ever hear about a safe deposit box in the same bank Credit Swiss, No. 1917? A. Well, something must be wrong in connection therewith, there had been something similar.

Q. What do you know about safe deposit box no. 1917 in the Credit Swiss? A. I only know that in connection therewith there was some mistake, but I don't know in which direction.

Q. Can you tell us today, of your own knowledge, Mr. Gaeng, that the shares of Overseas referred to in Interveners Exhibit No. 4 were not taken out of box no. 1917? A. As far as I know, this number 1917 does not exist at all. There must be some mistake connected with it.

Q. Now, I believe, you said, Mr. Gaeng, that you became a member of the administrative board some time in the year of 1942, is that correct? A. Yes, effective January 1, 1943.

Q. And before that you were the comptroller of the company, is that correct? A. Yes, the legal comptroller.

Q. While you were comptroller of Overseas, did you have any other employment? A. Yes, to fill even a whole book, 30, 40 or 50 clients, larger and smaller ones.

Q. And during the years preceding 1942, keeping the books of Overseas Corporation did not take much of your time, did it? A. Well, this might have amounted to a fifth.

Q. And while you were the comptroller of Overseas, where were the books physically kept? A. These books were kept in Zurich, and for some time in Liestal. And then, after the war broke out, we went to this place to pick them up, because this place was then temporarily occupied by military forces.

Q. At any time, prior to 1942, were the books kept in the office of Adler & Co.? A. This I don't know.

Q. When you worked on the books did you have to go somewhere to work on them? A. I was doing all the accounting work in a special room of the firm Adler & Co.

Q. Did you do accounting work for Adler & Co. itself? A. No, I did not.

Q. Did you lease an office from them? A. We did not pay anything for it, I think we did not pay for it.

Q. Do I understand you correctly to say that, when you went to work on the books of Overseas, you went to the offices of Adler & Co. and had a room there? A. Yes. There was a large desk with sliding panels which belonged to the firm Overseas.

Q. Now, until you became a member of the administrative board, on January 1, 1943, did you have anything at all to do with the management of Overseas Finance Corporation? A. Yes. I handled tax matters, moneys for extinction of mice and all sorts of sundry, small disbursements, house repair bills, and all such similar things pertaining to the Zurich phase of the business. Payment of mortgages, interests, all that is recorded in the Overseas books.

Q. Up until the year 1943 was it your function to decide any questions of policy with respect to the operations and investments of the Overseas Financial Corporation? A. Well, we only paid what we had to pay, so that the marshals would not come to levy execution.

Q. Prior to 1943, did the administrative board of Overseas ever confer upon you authority to make any decisions with respect to its investments in the United States or elsewhere? A. Well, no, we only made those payments in Switzerland, decisions from America we did not receive.

Mr. Baum: No further questions.

Redirect Examination by Mr. Ennis:

Q. Mr. Gaeng, was safe deposit box no. 1923 in the bank Credit Swiss, referred to in the power of attorney which is Interveners Exhibit No. 5, the only box for which you had power of attorney from Fritz von Opel? A. Yes, I had no other power of attorney.

Deposition of Adolf Gaeng—Redirect

Q. And is this the box from which you took out the Overseas shares on or about May 30, 1936, referred to in Interveners Exhibit No. 4, when you delivered them to Adler & Co.? A. Yes, I had to remove them from the safe. Here is the receipt for them (referring to Interveners Exhibit No. 4).

Q. Did you state, at the beginning of your testimony, that you had retired from your business recently? A. Yes, I have stated it, but I don't know whereto.

Q. One of the first questions, I asked you today, was your occupation, and my recollection is that you stated, that you retired, is that correct? A. Yes, this is correct, with the exception of three small matters.

Q. When did you retire? A. I mainly gave up my clients at the end of March 1952.

Q. Was there any particular reason for that? A. First of all I am suffering from a heart disease, then I am 71 years old and, well, I could not do the work any more. I wanted to say that I had a nervous breakdown in the middle of May of this year, this is about three months ago.

Mr. Ennis: No further questions.

Intervener's Exhibit 18

(Gaeng Deposition—Exhibit 4)

OEM

Withdrawn on May 30, 1936

1101 Spur (following word illegible) Vot. Certif.

1000 Oil Refin. shares
for deposit account Overseas with Adler.

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frs. 485,000 Overseas shares
for deposit with Adler for Frima Trust

(Sgd) Frankenberg
(Sgd) Gäng

(Gaeng Deposition—Exhibit 5 printed page 835a.)

(Gaeng Deposition—Exhibit 6 printed page 877a.)

Intervener's Exhibit 18 for Identification

(Gaeng Deposition—Exhibit 7)

November 3, 1941

The Banking Firm Adler & Cie., A.G.
ZUERICH

The Schweizerische Bankgesellschaft (Swiss Banking Association) will deliver to you

97 shares of Overseas Finance Corporation, Ltd.,

in Liestal, which you will accept in a deposit account for us, that is "Frima".

Respectfully,

(No signature or initials)

(Dr. Ulrich Hoche Deposition)

September 4, 1953
10.15 a. m.

Dr. Ulrich Hoche a witness, was called and having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Ennis:

Q. Will you state your full name and address. A. Ulrich Hoche, 35 Bermannstrasse, Munich-Passing 6.

Q. What is your present occupation, Doctor? A. I am retired. I am doing scientific work in the legal field.

Q. Can you state briefly what kind of work? A. I am working on the Commentary to the German Civil Code, and in a particular way I am working on the Law of Things. Besides this, I am working on other books. Most of them are published in House of C. A. Beck at Munich. This is an important law publishing house in Munich.

Q. Are you the author of a Commentary on the Law of Things? A. Besides my co-operation on the Palandt Commentary I have also taken care of the new edition of the publication on the Law of Things in the collection, "Examine Your Knowledge".

Q. Will you state, Doctor, what your legal education and legal experience has been? A. I studied three years law and political science. In 1913 I passed my first law examination. In 1920 I passed my second law examination. In 1922 I was appointed Landgerichtsrat with Landgericht 3 in Berlin, Charlottenberg. I think in 1928 I was appointed Assistant Judge with the Court of Appeals in Berlin, and in 1933 I was appointed a Judge of the Court of Appeals. At the same time I became a member of the Law Examination Board in Berlin. In 1935 I was transferred to Munich and I was there until 1945 also working in the Local Board of the Examination Board of Germany. In 1943 I was appointed a Chief Justice of one of the chambers of the Court of Appeals at Munich. Later on I was transferred to retirement.

Q. Dr. Hoche, in the course of your legal work, have you became familiar with the interest or right in property in German law known as usufruct? A. Yes. I already learned this at the university.

Q. Doctor, I would like to ask you your opinion on the German law applicable to the following hypothetical state of facts. Assume that a father and mother living in Germany make a gift contract with their son, a German citizen residing outside of Germany, under which the parents give the son shares in a German corporation. Assume further that the agreement provides that the usufruct in the shares is reserved to the parents. Assume further that the parties agree that the son will establish a usufruct in rem in the shares of the German corporation or in the proceeds of those shares if they are converted into other forms of property. Assume further that the son transfers part of the proceeds of the shares to a Swiss corporation for all of its stock, consisting of bearer shares, which are placed in the son's safe deposit box in a Swiss bank. Assume further that the son then gives in Switzerland to an agent of his parents a key to that safe deposit box together with a written power of attorney which is revocable granting the parents' agent, together with a third party, joint access to the safe deposit box. Assume further that the son retains separate independent access to the safe deposit box. Would a German court apply German or Swiss law to determine whether the delivery in Switzerland of the key and that power of attorney to the agent for the proposed usufructuary established a usufruct in rem?

Mr. Baum: I object to this question on the ground that the question of which law is applicable to the usufruct or its establishment is a matter to be determined by the Law of the Forum, namely the District of Columbia, and the District Court in the District of Columbia having made its determination of which law is applicable looks only to the substantive law of the foreign jurisdiction and not to the rules of conflicts of laws. I therefore object on the ground that the German rules of conflicts of laws are irrelevant and immaterial in this action.

A. The German court would in my opinion apply Swiss law, and this for the reason that the shares were in Switzerland at the time the usufruct was to be established. As to German international private law in matters of the Law of Things in a way of principle, it is always the law of the Situs.

Q. If German law applied, in your opinion would a usufruct in rem be created by the delivery of a key and a power of attorney on those stated facts? A. It is open to doubt. The German law would require the transfer of possession or co-possession on the part of the son to the usufructuary or his agent. I first only said co-possession because in cases of bearer shares co-possession is already sufficient.

Q. Assume, Dr. Hoche, that a German court decided in this case, which you have called doubtful, that a usufruct in rem was established. Assume further that the usufructuary's agent together with the third party who had the joint revocable power of attorney with him went to the safe deposit box, took out the bearer shares, and deposited them in a Swiss bank for the account of the legal owner. In your opinion, would a German court apply German or Swiss law to determine whether that deposit of the shares by the usufructuary's agent and the third party who had the power of attorney with him resulted in a loss of the usufruct in rem? Would a German court apply German or Swiss law?

> Mr. Baum: I make the same objection as to the rules of conflicts of laws as previously noted above.

A. If the shares were still on deposit in Switzerland and were taken therefrom and deposited with a Swiss bank in Switzerland, then a German court would apply Swiss law.

Intervener's Exhibit 18 for Identification

Deposition of Dr. Ulrich Hoche—Direct

Q. If German law were applied, will you state your opinion, Doctor, as to whether this transaction would result in a loss of a usufruct in rem in the shares if one existed immediately before the transaction? A. I understand the question in this manner: that the shares were placed on deposit in a different bank and that in that connection it was stated that the legal owner was the owner of them.

Q. That is correct. They were placed in another bank for the account of the legal owner. A. Then the usufruct was not lost.

Q. Why is that, Doctor? A. Because the depositing and safekeeping of the shares doesn't yet contain in itself the intention to get rid of the usufruct.

Q. On that state of facts, Doctor, suppose the usufructuary's agent in depositing the bearer shares with the second bank advised the bank to hold the shares for the account of the legal owner and did not advise the second bank that there was any usufruct in the shares. Would consideration of that fact change your answer? A. The fact alone that the second bank didn't know anything of the usufruct wouldn't change anything in my answer.

Q. Would your answer be different, Doctor, if the usufructuary's agent deposited the shares with the second bank in this manner with the consent of the usufructuary? A. Therein could be the intention of the usufructuary to abandon the usufruct.

Q. Assume, Doctor, that thereafter the legal owner made a contract to sell these shares to a dozen other persons residing in Switzerland, subject to a provision in the contract that the seller could repurchase the shares at the same price and the buyers could require the seller to repurchase the shares at the same price. Assume further that following the execution of that contract the bank in Switzerland in which the shares were deposited transferred them to another bank in Switzerland where they were held for the account of the purchasers. Assume further that the second bank was not informed that the shares were subject to a usufruct. Would a German court apply German or Swiss law in determining whether that transaction resulted in a loss of the usufruct in rem?

> Mr. Baum: Same objection as to the applicability of the rules of conflicts of laws. The question is further objected to as not in accordance with the facts of this case.
>
> Mr. Ennis: The question is stated as a hypothetical one. In the case of a prior witness on foreign law Mr. Baum objected to my asking questions based on the facts of this case.

A. The German court would again apply Swiss law.

Q. If German law were applied, in your opinion, Doctor, would that transaction result in a loss of the usufruct in rem? A. I understand the question in this way: that not only the second bank but also the purchasers had no knowledge of the existing usufruct.

Q. Yes, so understand the question, Doctor. A. If the purchasers in the transfer of title had no knowledge of the existence of the usufruct and if they had no cogent reasons to presume such a usufruct, then they acquired the title on the shares without the burden of the usufruct. That means that the usufruct then came to an end.

Q. Assume further, Doctor, that five years later after this transaction and pursuant to the agreement, the seller of these Swiss bearer shares repurchased them from the original buyers and the bank which acted as agent or depositary for the original buyers transferred them back to the bank where they had been held for the original seller, and they were there held by the bank for the account of the original seller; under German law would a usufruct in rem be re-established in the shares? A. No, except if the original seller would carry out the whole transaction for the only purpose to bring to an end the usufruct against the will of the usufructuary by means of a detour of title transfer.

Q. Would a German court apply German or Swiss law to determine the last question you answered?

Mr. Baum: Same objection as to conflicts of laws.

A. The German court would apply Swiss law. However, it is conceivable—which, however, I cannot say for sure—that the German court would take into consideration the legal concepts of the German law in dealing with the question whether the original seller acted with the intention to deprive the usufructuary of his usufruct. However, these are difficult questions.

[Portion Omitted Printed supra pages 528a-532a.]

Cross Examination by Mr. Baum:

Q. Doctor, the questions I will ask you will be concerned only with the German law relating to a usufruct. Is it not true, Doctor, that the important thing in establishing a usufruct under an agreement is that there must be delivery of the subject of the usufruct to the usufructuary? A.

As to German law, we have to distinguish between the usufruct on real property and on movable property and on rights.

Q. My question refers only to a usufruct in bearer shares of a corporation. A. To establish a usufruct on bearer shares of a corporation it is required the agreement between the parties with regard to the establishment of the usufruct and the transfer of the shares, in which case, however, the establishment of co-possession is sufficient. For the transfer one may substitute the assignment of the claim for delivery where the shares are not in the immediate possession of the legal owner, or by an establishment of a so-called Constitutum Possessorium, constructive possession, according to which the legal owner retains the immediate posession but grants to the usufructuary the indirect possession.

Q. Under German law relating to usufruct, Doctor, is co-possession by the owner and the usufructuary sufficient in a case of bearer shares? A. Yes, for establishing the usufruct. This is the law.

Q. And is it also correct, Doctor, that that co-possession need not be between the owner and the usufructuary, but may also be between the owner and an agent of the usufructuary? A. When saying "agent of the usufructuary" you apparently are referring to a representative of the usufructuary?

Q. Yes. A. It would be sufficient that co-possession is established between the owner and the agent.

Q. And is it sufficient for the purpose of establishing co-possession, Doctor, if the shares which are the subject of the usufruct are in a safe deposit box, that the owner gives to the usufructuary or his agent the key to that box and the right of access to the box? A. If in this way each of the two, I mean the owner and the agent, has access to the safe deposit box and if either of them alone or both of them jointly the co-possession would be transferred to the usufructuary, a prerequisite would be a power of attorney for the agent which would authorize him in dealing with the bank to have access to the safe deposit box either alone or together with the owner.

Q. Now assume, Doctor, that the agent of the usufructuary takes the shares out of the safe deposit box and puts them in a different bank in an account in the name of the owner, but the agent still has access to the shares in that account; would the necessary co-possession still be maintained under those facts? A. I don't understand in this question that if the shares are put on an account then the bank who takes custody of them, then there would only remain the so-called indirect possession but not a direct possession by the usufructuary. But then the owner and the usufructuary could still be indirect co-possessors. It appears to me that it is quite improbable that the usufructuary or his agent deposit the shares in the name of the owner at a bank, but on the other hand reserves for himself access to the shares. In any case, he would have acted only in a correct way if he would have deposited the shares on the account of both parties jointly with the indication who the owner is and who the usufructuary is.

Q. Is it not sufficient, Doctor, that the usufructuary or his agent and the owner both have access to the shares in that account? A. Access to the shares on the account is something which doesn't give any sense. Therefore it is difficult for me to answer this question in a correct way.

Q. I will ask the question a little differently, Doctor.

Suppose the agent of the usufructuary takes the shares out of the safe deposit box with the consent of the owner and gives them to a bank to hold in custody, and says to the bank with the consent of the owner: "Hold these shares in custody for the owner, but I am at all times to have complete access to those shares," and the bank agrees to give the agent such access; is the necessary co-possession still maintained? A. For establishing a usufruct the co-possession or sole possession is required, but for maintaining the usufruct it is not absolutely required that co-possession is maintained. If, however, the usufructuary surrenders his possession or co-possession, this under certain circumstances may mean that he has the intention to surrender the usufruct. It depends upon his intention. The surrendering of the possession may constitute an indication of such an intention. If, as it is assumed in this question, he states to the bank that he must have access at anytime to the shares, this speaks against his intention to surrender the possession.

Q. Now assume, Doctor, that the usufructuary and his agent and the owner agree together to take the shares out of this bank and to put them in another bank for the account of certain customers of the last bank under an agreement whereby the customers of the last bank ostensibly buy the shares but do not actually receive them, and the seller does not receive the purchase price, and under an agreement which provides that either party to the transaction may reverse it at any time, and under an agreement which provides that the shares will continue to be voted by the usufructuary's agent; and I ask you to further assume, Doctor, that the sole purpose of this transaction that I have just described was to avoid the payment of certain taxes. Would this transaction result in a loss of the usufruct in the shares? A. I must ask first of all whether the reference to the voting of the shares means that the shares were to be voted by the agent of the usufructuary.

Q. Yes. A. As the whole transaction was a sham transaction, that means as it was not earnestly intended, then as to German law it would be null and void. The title to the shares would not have been transferred to the purchasers and the usufruct if it existed before would have continued to exist. Whether or not a sham transaction was present in this case cannot be answered with certainty on the basis of the facts submitted. If the purchasers did not receive actually the shares, which apparently means that they did not get physical possession of them, then a possibility would not be excluded that a transfer of property took place because in case of transfer of title not always the direct transfer of possession is required, but such transfer may be substituted by the assignment of the claim for delivery against the bank holding custody of the shares. Paragraph 931 of the German Civil Code. It has been assumed that the seller did not receive the sale price. Well, this expression is not clear, because if the shares had been sold the seller is entitled to the payment of the sales price. If it had been agreed to from the beginning that such price is not payable, then there would have been no sales contract at all.

The agreement as to the possibility of revocation could legally be understood in such a way, provided a valid purchase contract has been concluded, that the original seller was permitted to repurchase the shares and that the purchaser was required to re-transfer same if the original seller demanded this. Such an agreement would not by itself speak against the bona fide nature of the transaction, because it happens in commercial life that an agreement for repurchase is entered into, and the German Civil Code in paragraph 497 through 503 has regulated the repurchase transactions. The intention to avoid payment of taxes is not by itself illegal. It would be a different matter to cheat the tax authorities. It is difficult to give a completely conclusive answer to this question. To do so, it would be necessary to know all the details and the motives of the parties.

Q. Suppose, Doctor, in the same situation which we have just been discussing the shares are re-acquired from the purchasers and are returned to the possession of the agent of the usufructuary. Would there be a usufruct after such return? A. If the first sale was earnestly intended and the title on the basis of the purchase was transferred to the purchaser, then if the purchasers did not have knowledge of the usufruct and had no cause to presume that there was such a usufruct, this usufruct would have terminated and it would not have been reestablished on account of the repurchase. The situation would be different, of course, if the title would not have been transferred to the purchasers because the whole transaction was a sham transaction and therefore null and void, or which I have already pointed out before, if it was only carried out with the provable intention to bring to termination the usufruct against the will of the usufructuary.

Q. Now, Doctor, I am going to ask you some questions on a different subject. Supposing parents make a gift of shares of stock to their son by a written agreement, and further suppose that that agreement provides that the usufruct in the shares is not transferred to the son but remains with the parents. Given those facts, would you say that the parents had reserved to themselves a usufruct in all the shares and in all the income from them? A. If I understand this question correctly then, this is a matter which is evident provided that the form of the establishment of the usufruct has been observed, or did I misunderstand the question?

Q. Now, Doctor, if two parties by written agreement provide for the establishment of a usufruct, but the necessary co-possession is not delivered to the usufructuary, what rights does the usufructuary under German law have against the owner? A. He has the right to the transfer of the co-possession.

Q. And if the owner refuses to establish co-possession under those circumstances, can the usufructuary ask a German court to compel the owner to establish such co-possession? A. Yes, he can bring legal action.

Q. And would your answer be the same if the necessary co-possession had once been established and then lost? A. If it is said that the co-possession was lost is it meant that the owner has now again become the sole possessor?

Q. Yes. A. Yes, then the usufructuary has the same claim provided he has not waived his right of co-possession.

Mr. Baum: No further questions.

Redirect Examination by Mr. Ennis:

Q. One question, Dr. Hoche. Assume that the agent of a usufructuary deposited bearer shares of a corporation subject to usufruct with a bank for the account of the legal owner of the shares. As a matter of German law could the agent of the usufructuary retain any possession of or access to shares so deposited for the account of the legal owner without notice to and consent of the legal owner? A. I presume that in such a case the banking house when confirming to the owner the establishment of the deposit account at the same time will notify him about the reservation of the depositor, that is, of the agent. I cannot imagine that a banking house would act in a different manner, because otherwise it would incur the danger of becoming liable toward the legal owner. In my opinion, the banking house would have to make a notation in the deposit account to the effect that besides the owner of the account, that is, the owner of the shares, someone else also has a right of disposition.

Mr. Ennis: No further questions.

Mr. Baum: No further questions.

Mr. Ennis, is it stipulated that these depositions need not be signed by the respective witnesses and that the original transcript of the depositions need not be certified by the Consul and may be transmitted to the attorneys for the Defendant for filing with the United States District Court?

Mr. Ennis: It is.

Mr. Baum: I would like the record to show that throughout the foregoing depositions Mr. Fritz Von Opel has been present.

I also wish to request of counsel for Mr. Von Opel that he obtain from his client his client's consent to have representatives of the Government inspect and copy the records of any and all accounts maintained by Mr. Fritz Von Opel at the Deutscher Bank in Frankfurt, the successor of which is the Suddeutscher Bank.

Mr. Ennis: This is the first that I have heard of this matter, and I think it is a proper matter for discussion between counsel, and not a matter for part of a record on depositions of witnesses.

Mr. Baum: Do I take this to mean that Mr. Von Opel refuses to give such consent?

Mr. Ennis: No.

(Dr. Paul F. W. Gmuer Deposition)

September 3, 1953
9.40 a.m.

Dr. Paul F. W. Gmuer a witness, was called, and having been duly sworn, was examined and testified as follows.

Direct Examination by Mr. Ennis:

Q. Will you state your full name, address and occupation, please? A. Paul F. W. Gmuer, with offices at Loewenstrasse 1, Zurich; member of Zurich and Swiss bars.

Q. Doctor, will you state what your legal education has been? A. I attended the law school of Zurich University and terminated my studies with the degree of Doctor of Law.

Q. What year? A. In 1939, then I entered into practice first with the District Court of Horgen as a—we call that "Al Dito", a secretary who takes the protocol, the minutes of testimonies, for instance, and also of what the attorneys pleaded, and then in this capacity I also—that was my usual work—I also prepared opinions for the judges. After that I made a practice of six months with an attorney in Zurich, and then I passed the bar examination in 1942. After that I worked until 1945 with the Swiss Foreign Office as a lawyer, and since then I am practicing law as an attorney and member of the bar of Zurich and also of the Swiss Bar.

Q. Is yours a general practice, or do you specialize in any particular field? A. I specialize in estates, property law, corporations, taxation. I do not take divorce cases, for instance, and criminal law.

Q. Does Swiss law recognize the interest of usufruct? A. Yes, by Statute. The Swiss Civil Code deals in Sections 745 to 781 with usufruct and other servitudes.

Mr. Baum: Sections of what?

A. Sections of the Swiss Civil Code. And usufruct is also mentioned in Estate Law, for instance in Section 462 of the Swiss Civil Code. Usufruct is also mentioned in the Swiss Code of Obligations, which is an annex to the Swiss Civil Code in Section 690 of the Swiss Code of Obligations with respect to corporations.

Mr. Baum: May I just clarify this? You said it is in 462 of the Estate Law. Is that a chapter of the Civil Code?

A. It is in the chapter of Estate Law.

Mr. Baum: But it is part of the Civil Code?

A. Yes.

Q. Have you in the course of your practice had occasion to deal with cases involving the interest or right of usufruct? A. Yes, I have.

Q. Are you familiar with usufruct as it is defined in German law? A. I have no detailed knowledge, but I know that what we call Nutzniessung under Swiss law is very much the same interest as Niessbrauch under German law.

Q. Does the Swiss Civil Code provide how a usufruct is created under Swiss law? A. Yes, it does. It may be created either by operation of law, which is the case under the estate law, or it may be created on the basis of a contractual relationship. The second kind of creation of a usufruct is dealt with in Section 746 of the Civil Code.

Q. May a usufruct be created in real property? A. Yes, it may.

Q. And may a usufruct be created in tangible personal property? A. Yes, that is correct.

Q. And may a usufruct be created under Swiss law in intangible personal property such as obligations from one person to another? A. Yes, it may.

Q. May it be created in shares of corporations? A. Yes.

Q. Does the code set out any specific requirements for the creation of a usufruct, and if so, what are they? A. Yes, it does. I already mentioned Section 746 of the Civil Code, which provides that the usufruct of movables and rights is created by transfer to the usufructuary. May I correct myself. I think I said "may be created"—is created that way by transfer to the usufructuary, and the usufruct of immovables by registration in the Land Register.

Q. Does the Swiss law recognize a distinction between a contractual usufruct and a usufruct in rem? A. Well, the term of usufruct is understood to be a right in rem. Even though right in rem is created there is no usufruct in the sense of the law. Have I made myself clear? You can agree to create a usufruct, but that is not yet the usufruct. It has to be created by certain operations.

Q. Would you state what those operations are? A. It is a transfer of the property charged by usufruct to the usufructuary.

Q. Now, does a transfer as constituted, Dr., include the concept of a change of possession? A. Yes. Section 746 of the Swiss Civil Code dealing with that question says: In the absence of a contrary provision the acquisition and registration of a usufruct are governed by the rules relating to ownership. That means that the transfer of the property charged by a usufruct to the usufructuary has to be effected by the same means as a transfer of ownership, and the transfer of ownership in turn is effected by the transfer of possession. The Swiss law distinguishes between possession and ownership.

Q. You stated, in the absence of contrary provision. Does that mean statutory provision or provision in an agreement of the parties, or both? A. No, the law here refers to statutory provisions, especially under the estate law, where at the death of the deceased, for instance of a deceased husband, the usufruct is created by operation of law in favor of the wife. That is what the law means here.

Q. In the case of a creation of a usufruct in personal property, can you state generally what are the rights of the usufructuary? A. Well, the usufructuary has the right to the possession, use and enjoyment of the res fructuaria, and besides that he also has the management of the property.

Q. Does the Swiss law place any limitations upon the usufructuary's rights as manager of the property? A. Yes, it does by statute. Section 755 of the Civil Code says that in the exercise of his rights the usufructuary must use the degree of care looked for in a good manager.

Q. Is there a specific provision in this regard in respect of a usufruct in corporate shares? A. Yes, there is. There is a special provision in Section 690 of the Code of Obligations dealing with the rights of the usufructuary if the res fructuaria are shares in a Swiss corporation and the law says there: Shares in which there is a usufruct are represented by the usufructuary, who is liable to the reversioner for any failure to have due regard to his interests.

Q. Under Swiss law, can an owner of bearer shares in a Swiss corporation create a usufruct by giving possession of the bearer shares to a second person accompanied by an oral statement that it is agreed that the usufruct is thereby created? A. Yes, I would say the other way around. If a usufruct in rem is to be created, what is required first is an agreement between the parties to create such usufruct, which agreement may be oral or in writing, not subject to any formal requirement. That's the basis, and the establishment of the usufruct in rem is then effected and has to be effected if bearer shares are involved by giving, by passing possession of the bearer shares to the usufructuary.

Q. In such a case, could a usufruct in rem in the shares be created under Swiss law if instead of delivering possession of the bearer shares, the owner delivered to the proposed usufructuary under the agreement you mentioned a key to a box or a room in which the shares were kept? A. Yes.

Q. That would be sufficient? A. Yes. It depends, of course, what the box is. If the box is with a bank, that wouldn't be sufficient, just the handing over of the key.

Q. Let's take different cases. Suppose the delivery of the key was to a room, for example, where the shares were kept, and the owner of the shares thereafter had no separate access to the room—would that be sufficient? A. Yes.

Q. Take the example you mentioned. Suppose the box was a safe deposit box in a Swiss bank, did I understand you to say that the mere delivery of a key to the box would not be sufficient? A. No, it would not. The bank would not give access to the box to the man who just shows a key.

Q. Well, suppose that in addition to the key, the owner of the shares turned over to the proposed usufructuary a revocable power of attorney on a form acceptable to the bank to enter the safe deposit box, so that after this transaction both the owner had access to the safe deposit box and the proposed usufructuary with the key and the revocable power of attorney had access to the box. At that point, under Swiss law, would a usufruct in rem be created? A. That is a pretty close question. There is a decision, a not very recent one, but a decision of the Swiss Federal Supreme Court involved in the creation of a usufruct by the transfer of ownership between husband and wife. In this case the husband put securities in a safe deposit box with a bank in his name and gave his wife a key and also power of attorney; but he continued to manage the property, he cashed coupons and he converted debentures, he sold and purchased securities, of course with the agreement of his wife, but entirely independent from her. And the Federal Supreme Court found that this was a valid transfer of property, of ownership, from the husband to the wife. Now, of course, this case decided here by the Federal Supreme Court is not quite the same as the one you submitted to me.

> Mr. Baum: May I interrupt just a moment. May we have the citation of that case?

A. Yes. B.G.E. Volume 62 II, page 197. Now, as I said, I think this case I just mentioned is not quite the same as the one you submitted to me. In this case the Federal Supreme Court was faced with a relationship between husband and wife, and it is normal and it is even provided for in the law that the husband has the management of the wife's property; so that I think that even in view of this decision of the Federal Supreme Court, I would try a case, a new case with the Federal Supreme Court involving the facts which you have submitted to me and I think I would have a reasonable chance to be successful in holding that no valid usufruct has been established. My reasoning would be the following: because the usufructuary derives his right from the owner by means of a power of attorney, he has no separate independent right of access. The owner may at any time revoke the power of attorney, because under Swiss law any power of attorney can be revoked at any time.

Q. Suppose, Dr. Gmuer, I change the facts of the last hypothetical case you discussed in one particular, namely, that the power of attorney is given by the owner of the shares not to the proposed usufructuary, but a revocable joint power of attorney is given to an agent of the usufructuary and another person? A. Who is not an agent of the usufructuary?

Q. Who is not an agent of the usufructuary, so that they can according to the terms of the power of attorney only have access to the safe deposit box jointly. A. I have the greatest doubts whether any Swiss court would hold that by doing so a usufruct has been established, because what is missing is the independent right of the usufructuary or his agent to have access. They need a third party who has nothing to do with the usufructuary. The case of course has never been decided.

Q. In such a case might the laws be different under Swiss law, if it was the intention of the parties that the delivery of the key and such a limited revocable power of attorney was intended to establish a usufruct? A. Well, the parties cannot change the law, and the provisions on the establishment of usufruct in Section 746 of the Swiss Civil Code are mandatory law. What is required is the establishment of possession or co-possession by the usufructuary, and the parties cannot say, "Well, we consider a certain state of facts as co-possession, although it isn't co-possession in the sense of the law."

Q. Under Swiss law, Dr., if the donor of a gift of shares, corporate shares, and the donee agree as part of the gift agreement that the donee would establish a usufruct in the shares in favor of the donor, what would the rights of the donor be against the donee prior to the establishment of the usufruct? A. He would have a personal claim against the donee for the establishment of a valid usufruct in rem.

Q. Under Swiss law, how would he enforce that personal claim? A. By suing in court. Maybe you could even get an injunction on the basis of the gift agreement.

Q. Does the Swiss law recognize such a thing as a mandatory order against a person to do in fact what he has agreed to do; or to be more specific, could you conceive that a Swiss court might enter a judgment requiring the donee in such a case under some penalty of contempt of court, for example, to actually establish the usufruct in rem? A. Well, contempt of court, that doesn't exist under our law. Of course, the judgment may be that the donee has to establish the usufruct by transferring possession, and if he doesn't, that he is fined or something like that. I think it is the same as contempt of court. I must also mention that the procedural end of it is varying from canton to canton, because we have no unified federal rules on procedure, you see. That is cantonal law.

Q. Under Swiss law, does a usufructuary in corporate shares have legal title to the shares? A. I think we have to agree first on the term of legal title. Under Swiss law he is not the legal owner of the shares. He has just a limited right in rem; and I think that on the basis of what you have said, I can answer your question with no, because legal title means legal ownership.

Q. In such a case of a usufruct in shares of a Swiss corporation, what would the usufructuary's rights be in respect of the corporation's income? A. He would not have any rights regarding the corporation's income unless such income is distributed in the form of dividends.

Q. He would have a right to the dividends once they were declared or determined by the corporation; is that true? A. Yes.

Q. And would he not have some rights, if the corporation had income, to require that dividends be determined for his use? A. Only by way of exercising the voting rights, because under Swiss law a dividend is declared by resolution of the general meeting of the shareholders.

Q. Would the legal owner of the shares in a Swiss corporation subject to usufruct have any rights in respect of the income of the corporation? A. No.

Q. Would he have any rights in respect of the determination of the dividends at the general meeting of the corporation? A. Only by way of exercising his voting rights.

Q. Now, do I understand that the legal owner as well as the usufructuary would have some interest in the voting rights on the subject of dividends? A. The law says, explicitly states, that where a usufruct exists in the shares of stock of a corporation, the usufructuary has the voting rights; that is to say, it only says that the usufructuary represents the shares, which means that he has the right to exercise the voting rights.

Q. Does the legal owner have any rights which he can assert in court, for example, in relation to the manner in which the usufructuary exercises the voting rights on the subject of dividends? A. Yes, in the following way. Our law knows or provides for an action to invalidate resolutions passed by the general meeting of shareholders, and there is a decision of the Zurich Commercial Court that this suit for invalidation of resolutions passed by the general meeting may be brought by the legal owner independently from the usufructuary.

Q. Would you identify the case by citation? A. Yes, the case is published in Blaetter fuer Zuercherische Rechtsprechung, Volume 39, number 97; and the legal doctrine is based on that case, that the legal owner has also the right to sue independently from the usufructuary the members of the board for damages on account of negligence or civil offenses.

Q. Would that include an action of negligence for mismanagement? A. Mismanagement.

Q. Would that doctrine give the legal owner any right to sue in respect of any decision of the general meeting on the question of how much dividend should be declared? A. Well, not for mismanagement, but the other is invalidation of resolutions passed in the general meeting.

Q. Would his rights include invalidation of a resolution involving approval of a dividend or determination of a dividend? A. I think only if such resolution was passed improperly.

Q. Can you explain "improperly", Dr.? A. Yes, for instance, without proper notice to the shareholders, without a quorum being provided for in the charter or having been regarded—things like that.

Q. Would it include, for example, an assertion by the legal owner that the dividend excessively depleted the working capital of the corporation? A. I doubt it, unless it was a violation of provisions of the charter—we call it Statuten Articles—or of the law on that subject; and the law contains provisions regarding reserves to be made and depreciation, and so on.

Q. And if any of those provisions were violated by a dividend, as I understand your testimony, the legal owner of the shares subject to the usufruct could raise that question? A. I think so.

Q. In the case of a usufruct in the shares of a Swiss corporation which held among its assets the shares of other corporations, what rights would the usufructuary have, if any, in this property of the Swiss corporation consisting of shares in other corporations? A. None.

Q. Can you explain the reason for your answer, Dr.? A. The stock in other corporations is owned by the corporation, and not by the shareholder of the corporation.

Q. Does the Swiss code contain provisions for termination of a usufruct? A. Yes, it does. In Section 748, which in translation reads as follows: "A usufruct is extinguished by the total destruction of the res fructuaria, and in addition in the case of an immovable, by the erasure of the entry in the register if registration was necessary for its creation. Other grounds of extinguishment, such as lapse of the time for which it was created or the renunciation or death of the usufructuary only give the owner of the res fructuaria, where this is an immovable, the right to demand erasure of the entry in the register." A further paragraph which doesn't interest in this connection reads: "A usufruct arising by operation of law ceases to exist with the ground which gave rise to it."

Q. Is there any other manner in which a usufruct may be lost under Swiss law? A. Yes, I think there is. What I just read is the termination of the whole relationship between usufructuary and owner; and I think although there are no decisions on that subject, that since for the establishment of a usufruct the transfer of property is required, a re-transfer of the property or a loss of possession by the usufructuary also destroys the usufruct as a usufruct in rem. There is, however, a commentary, a rather old one, a commentary Leemann. Leemann says two things: One, a usufruct may cease to exist although possession by the usufructuary is maintained. For instance, if the usufruct was established for ten years and the usufructuary didn't give the property back, the usufruct ceases to exist although he still has the object. And he also says that the return of the object charged by usufruct to the owner is not sufficient to end the usufruct unless it is accompanied by a declaration, which may be oral or may even not be expressed at all. I personally think that this man Leemann, who wrote his commentary in 1925, goes a little far.

Mr. Baum: May I have the page or section you were reading from?

A. That is Commentary to Section 748 of the Swiss Civil Code, Note 3.

Mr. Baum: Page 475?

A. I think the page depends on the edition. That is the edition of 1925. I think Leemann goes a bit far. I think what prevails is the question of whether the usufructuary maintains possession or at least co-possession, and if that does no longer exist the usufruct has ceased to be a usufruct in rem.

Q. Does some right remain? A. Yes. If he didn't declare that when he gave the property back or he did not have the intention of terminating the usufruct, his personal claim against the owner of re-establishing the claim revives.

Q. Under Swiss law is a usufruct assignable by the usufructuary? A. No, not the usufruct as such, which is a highly personal right; but the exercise of the usufruct may be assigned.

Q. What would be the right of the assignee as distinguishable from the usufructuary's rights? In other words, if the right to the exercise of the usufruct is assigned, does the assignee get something less that the usufructuary has? A. No, he gets exactly the same. He gets the income of the res, less expenses the owner has, which can also be charged to the usufructuary, expenses for maintenance and so on. That doesn't apply to shares, of course, but for instance, to immovables.

Q. What would be the situation on shares? A. Well, what he could assign would be the rights to the dividends. I must add this. Even such assignment of the exercise cannot be made where the usufruct has an especially designated personal right—which is not the case here. The law says in Section 758: A usufruct is assignable to a third person provided it is not of an essentially personal character. But that is not the correct translation, because the law reads otherwise.

Q. Give in English what you think. A. I would say the exercise of a usufruct is assignable to a third person provided it is not of an essentially personal character. That is the correct translation. That is what the law says, that there is an absolute prohibition of transfer in the case of a highly essentially personal character. To give you an example, the father has a usufruct of the property of his minor children. This cannot be assigned. Not even the exercise of such usufruct can be assigned.

Q. That's because of his responsible relationship. A. No one can succeed him in his capacity as father, and he has the right just in his capacity of father of his minor children.

Mr. Baum: Would you clarify that?

Q. Do you mean a usufruct by operation of law in that case? A. Not exactly.

Q. If the father by agreement was given a usufruct in property transferred to his minor children by gift— A. To his minor children?

Q. Yes, to his minor children, by gift, would that be a special relationship of the kind which would prohibit under Swiss law assignment of the father's usufruct? A. I think that is a highly hypothetical case, because a father has by operation of law the right to use the property of his children, and he cannot enter into a contract with his children without the guardianship court coming in.

Q. After such an assignment of the right to exercise a usufruct, would the usufructuary retain any rights, for example, the right to terminate the usufruct? A. I think so, yes, because the right to the usufruct itself is unassignable, so he can still freely dispose of it.

Q. In addition to assignment under Swiss law can a usufruct or the right to exercise it be transferred to another party by operation of law? A. It may be transferred by attachment or by bankruptcy of the usufructuary.

Q. In such a case, does the usufruct itself or merely the right to exercise become transferred by operation of law? A. The right to exercise, and in bankruptcy a special administrator is appointed for this property because the property cannot be assigned to the creditors. It is a continuous administration. The receiver cashes the income and pays it to the creditor.

Q. Under Swiss law can a usufruct be established in a monetary claim owed by a Swiss corporation to an individual? A. Yes.

Q. How would that be done? A. It must be done by assignment, by assignment of the claim from the creditor or owner to the usufructuary.

Q. Did I understand you to mean assignment of the claim and not merely a usufruct in the claim? A. No, the claim has to be assigned. That is the equivalent of possession in the case of a res, you see. Here we have no res, just the claim, which is somewhere in the air, so you have to assign it, and the assignment under our law is to be in writing to be valid.

Q. It must be in writing? A. It must be in writing.

Q. If the owner of the claim would have to assign the claim in writing to give a usufruct in it, by what means under Swiss law would the legal owner retain his interest in the claim, apart from the usufruct? A. He may assign it just with the remark "for usufruct", or he may assign it fully and then of course there is an understanding, an agreement between the owner and the usufructuary that once the usufruct is terminated the usufructuary has to reassign the claim to the owner.

Q. In this particular case in which we are interested, Dr. Gmuer, a gift of shares in a German corporation was made by German parents living in Germany to their son, then a German citizen residing outside of Germany, and was executed in Germany, and the proceeds of this gift by the sale of the German corporation shares in part were placed in a Swiss corporation in exchange for all of its shares; and the court has found that the parties, with the intention of establishing a usufruct, arranged for the son, the legal owner of the Swiss shares, to deliver a key to the son's safe deposit box in Zurich where the shares were kept to an agent of the German parents in Germany, for whom the usufruct was to be established, and the court has found that that key was delivered in Switzerland. On those facts can you state your opinion as to whether the establishment of the usufruct in the shares of the Swiss corporation would be governed by Swiss or German law?

Mr. Baum: I object to that question on several grounds. Firstly, it is not a proper form of question to be addressed to an expert on foreign law since it is not composed in the form of a hypothetical question; secondly it is not proper questioning of a foreign law expert to restate the findings of an American court and ask him to express his opinion thereon; thirdly, while reserving all objections to the materiality or relevancy or admissibility of this entire testimony, it is not a proper subject of testimony by an expert on foreign law as to which law a Swiss court would apply to a given transaction, since the determination of which law is applicable is a matter to be determined by the law of the forum, which in this case is the District of Columbia; and the court having determined which law is applicable, the foreign rules of conflicts of laws are not to be applied. I also wish to state that the question is further objectionable since it does not accurately describe the facts of the case to which it ostensibly refers.

Intervener's Exhibit 18 for Identification

Deposition of Dr. Paul F. W. Gmuer—Direct

Q. Now, Dr. Gmuer, considering that statement as the state of actual facts in this case or as a hypothetical statement of facts, can you express an opinion as to whether the establishment of the usufruct would be governed by Swiss or German law?

Mr. Baum: I renew the objection to the additional question on all grounds stated.

A. Well, if a Swiss court were asked to decide, it would apply the Swiss rules on conflicts of laws, and in consideration of these rules which are unwritten but have been developed in a very extensive jurisprudence, the Swiss court would certainly apply Swiss law as to the question of whether a usufruct in rem had been validly established with respect to the shares physically located in Switzerland.

Q. Applying Swiss law and taking into consideration the additional facts that the parents' agent did not obtain access to the safe deposit box in which the shares were kept by the delivery of the key, but only pursuant to a revocable power of attorney given by the legal owner to the parents' agent together with a third person, not the agent of the parents, who could only have access to the safe deposit box jointly, will you state your opinion as to whether under Swiss law a usufruct in rem was established?

Mr. Baum: Same objection.

A. I think I have already answered this question hypothetically or on the basis of a hypothetical statement of facts and I can repeat it. It is a very close question and there are no decisions on that subject, but I feel I would have a very good case in the Swiss courts in asserting that no valid usufruct in rem had been established.

Q. Assume, Dr. Gmuer, however, that a Swiss court had held that a usufruct in rem had been established under such a state of facts, and assume further that thereafter the legal ownership of the shares of the Swiss corporation were transferred by the legal owner to a Liechtenstein Verwaltungsanstalt, of which the legal owner was the sole irrevocable beneficiary; and assume further that thereafter the shares were transferred from the Swiss bank in which they were held for the account of the Verwaltungsanstalt to another bank for the account of the purchasers of the shares, pursuant to a contract of purchase which gave the seller the right to repurchase the shares and the buyer the right to resell the shares to the former owner; assume further that neither the buyers nor the Swiss bank which acted as their representative were informed of the existence of any usufruct in the shares, and assume further that the usufructuary's agent through whom the usufruct was established, consented to this contract and sale; can you state whether or not under Swiss law a transfer of the shares to the bank representing the purchasers would result in a loss of the usufruct?

> Mr. Baum: I will object to that question as immaterial and irrelevant on the ground that it has no bearing on the facts of this case and does not accord with the facts previously found herein.

A. My opinion is that the usufruct in rem discontinued to exist because the usufructuary lost possession or copossession of the res fructuaria.

Q. Assume further, Doctor, that some five years later after this transaction in 1941 the contractual rights were exercised and the shares were repurchased and transferred from the bank which represented the original buyers to the bank which represented the original seller and thereafter held for the account of the seller. Would that subsequent transaction change your opinion that under Swiss law the usufruct in rem was lost, and if so, in what respect?

Mr. Baum: Same objection.

A. It doesn't change my opinion.

Q. Is that because the possession of the usufructuary would not be restored or because it is irrelevant, the subsequent transaction? A. Yes. The usufruct was lost when the usufructuary lost possession or co-possession, that is to say, the right to dispose over the shares, and since this possession was not re-established when the shares were purchased back by this Verwaltungsanstalt, which is a corporate body under Liechtenstein law, the usufruct in rem was not re-established.

Q. Dr. Gmuer, I show you Intervener's Exhibit No 8, which purports to be a photostatic copy of a copy of a letter from the Swiss Compensation Office. Have you seen the original of that letter?

Mr. Baum: I object to any questioning of this witness as to a document not in evidence, as to a document that has not been identified as genuine by the writers thereof, and further object on the ground that it is not a proper subject of interrogation of an expert on foreign law to interrogate on a letter written by someone else, which in this instance must be considered purely hearsay.

A. I received personally the original of this letter.

Q. Was your receipt of this letter preceded by conferences with officials of the Swiss Compensation Office? A. Yes, it was.

Q. Will you state what the subject matter of those conversations was?

Mr. Baum: Objected to as irrelevant and hearsay.

A. I had filed an application for the release of Overseas Finance Corporation from being blocked under the Swiss regulations regarding German property located in Switzerland.

Q. If you know, on what ground was the property blocked?

Mr. Baum: Objected to as calling for a clear hearsay answer.

A. The Corporation to my knowledge was blocked because of allegedly being controlled by a German domiciled in Germany, in the sense of the aforesaid regulations.

Q. Was that control based on alleged usufruct between Germans in the shares of stock of the Overseas Finance Corporation?

Mr. Baum: Same objection, and also objected to as calling for a conclusion.

A. Yes. I learned during my negotiations with the people of the Swiss Compensation Office that this was the main ground on which the Overseas Finance Corporation had been blocked.

Q. In addition to the application for unblocking or release, did you submit documentary material to the Swiss Compensation Office for their consideration of this issue? A. Yes, I did.

Q. In the course of the conferences with the officials of that office to which you have referred, were you advised that other parties had submitted files of documentary material for their consideration on this question?

Mr. Baum: Again objected to as hearsay.

A. Yes, I was advised accordingly.

Q. Were you told whether or not the United States Department of Justice had submitted material to the Swiss Compensation Office for consideration of the question before that office?

Mr. Baum: Same objection.

A. Yes, I was told so.

Q. Did this letter addressed to you contain the decision of the Swiss Compensation Office?

> Mr. Baum: Objected to on the ground that the letter speaks for itself and is the best evidence of its contents. A. Yes, it does.

Q. Following your receipt of this letter were the assets of the Overseas Finance Corporation released by the Swiss

Government? A. Not only the assets, but the Corporation itself, and also Frima which had also been blocked.

Mr. Ennis: No further questions.

Mr. Baum: I move to strike all of the testimony concerning the letter from the Swiss Compensation Office, marked Intervener's Exhibit 8, and concerning any negotiations or discussions with this office upon the ground, among others, that the decision or opinion of the Swiss Compensation Office is irrelevant, immaterial and inadmissible in this action, as a conclusion of a third party on the issues of this action, which issues must be determined by the courts of the United States, and upon the further ground that in any event the testimony is entirely hearsay as to opinions of a third party not binding on the defendant herein.

Cross Examination by Mr. Baum:

Q. Dr. Gmuer, are you now an attorney for Fritz von Opel? A. Yes, I am.

Q. And are you an attorney for Ubersee Finance Corporation? A. I was.

Q. Until when? A. Until the Corporation was released by the Swiss Compensation Office.

Q. In other words, in the negotiations of the Swiss Compensation Office which you testified about, you were acting as attorney for Ubersee? A. Yes, I was.

Q. And for Frima? A. Yes.

Q. And how long have you been attorney for Mr. Fritz von Opel? A. I personally commenced to act for him and his corporations in 1947, if I recall it correctly, or 1946 even.

Q. And by his corporations you mean Ubersee and Frima? A. Yes.

Q. And until his death were you also the attorney for Hans Frankenberg? A. I was the attorney for Hans Frankenberg in one particular case.

Q. What case was that? A. I advised him in connection with the suit brought by Mrs. Margot von Opel, the former wife of Mr. Fritz von Opel, against her former husband.

Q. Was Mr. Frankenberg a party to that case? A. No, he was a witness.

Q. And you acted as his advisor in his capacity as a witness? A. Yes. and may I state why I had to advise him?

Q. If you wish. A. The question arose whether he was allowed to make certain depositions in that case in view of the Swiss banking laws and the Swiss banking secret.

Q. And did you also act as advisor to Mr. Hans Frankenberg in connection with a deposition he was to give in an action brought by Margot Von Opel against the Attorney General of the United States? A. Yes, that was the case. It was not a case brought against Fritz Von Opel, but against the United States. I wrongly indicated the parties in that suit. It was the case of Margot Von Opel against the Attorney General of the United States.

Q. And that was the case in which Mr. Frankenberg, after conferences in which you participated, ultimately went to Germany and testified by deposition; was it not? A. That is correct.

Q. And was your advice to Mr. Frankerberg that he could testify at the end? A. That's wasn't the question, whether he could testify or not. The question was whether he was allowed to disclose certain facts which were contained in the books of Adler and Company.

Q. And he did ultimately testify as to those facts, did he not? A. Not all of them.

Q. But you raised no objection to the facts as to which he ultimately did testify, did you? A. No, I did not.

Q. Now, in connection with your negotiations with the Swiss Compensation Office, you stated that you knew or learned of the grounds on which the property of Ubersee had been blocked. Were you told that by officials of the Swiss Compensation Office? A. Yes, I was.

Q. And how did you know that the United States Department of Justice submitted documents to the Swiss Compensation Office? A. I was told by the officials of the Swiss Compensation Office.

Q. Did they tell you what documents the United States Department of Justice had submitted? A. I think they mentioned several documents, but I don't recall what documents they mentioned.

Q. At this moment you have no idea as to what the documents were? A. No.

Q. And what documents did you submit? A. I submitted all the written records of the lawsuit Overseas had brought in the United States against the Attorney General.

Q. You mean the printed record? A. The printed record.

Q. Did you submit the opinion of the District Court in the United States? A. Yes, all the opinions yet rendered in this case.

Q. The opinion of the Court of Appeals for the District of Columbia? A. Yes.

Q. The opinion of the United States Supreme Court? A. Yes.

Q. Coming now, Dr. Gmuer, to the Swiss law concerning usufruct, at the beginning of your testimony I believe you stated that in order to create a usufruct under Swiss law it was necessary not only that there be an agreement between the parties, but that there be a transfer of possession from the owner to the usufructuary; is that correct? A. That is correct.

Q. Did you mean by that a transfer of sole and exclusive possession or a transfer of co-possession? A. I think I stated that co-possession is sufficient.

Q. In other words, it is a true statement that under Swiss law a usufruct may be validly created if there is an agreement to create a usufruct and if the property, the res which is to be the subject of the usufruct, is put into the joint possession of the owner and the usufructuary? A. Well, I wouldn't go that far.

Q. What do you mean by the term "co-possession"? A. I would say the term co-possession as it is used, as I am informed, under German law does not exist that way under Swiss law. Swiss law knows possession on different grounds. The owner has the so-called independent possession and there may also be what we call dependent possession, namely, possession pursuant to a special legal relationship such as the possession of a depositary.

Q. Now, Mr. Gmuer, I believe you testified that you can create a usufruct in a tangible piece of property; is that not correct? A. Yes.

Q. Let's assume that I have a valuable painting and I agree that you are to have a usufruct in that painting, which is at the moment located in my home, and let us further assume that I say to you: Pursuant to our agreement I hand you this painting and hereby establish your usufruct, and it is agreed that we will put this painting on the wall of an office which we jointly occupy.—Does that create a usufruct under Swiss law? A. I don't think so.

Q. Why not? A. Because the usufructuary has not the exclusive use of this painting.

Q. In other words, you are now saying that the usufructuary must have the physical possession of the thing to the exclusion of the legal owner? A. Yes, in the case of a painting.

Q. All right, now, let us change the situation I gave you a little bit, and say that we make an agreement that I will give you a usufruct in a hundred shares of General Motors Corporation stock which I have in my hand, and I say to you: I give these shares to you pursuant to your usufruct. I hereby transfer possession and we will put these shares in a locked file cabinet which is in an office jointly occupied by the two of us.—Would that create a usufruct under Swiss law? I may add that we both have keys to the file cabinet. A. That is doubtful.

Q. Why? A. Because the owner maintains separate access to this file cabinet.

Q. All right. Now, let us change the last hypothetical case I gave you just slightly. Instead of putting it in a file cabinet to which we both have keys, let us assume there is just one key to the file cabinet and that we agree after having gone through all the steps I have mentioned, that that key will be given to a Mr. X and that Mr. X will not surrender that key to either of us but only to the two of us together. Would that establish a usufruct? A. I doubt it.

Q. Why not? A. Because the usufructuary has no independent and separate access to the res fructuaria.

Q. Let us see if we understand your testimony now. Is it correct then that under Swiss law the usufructuary must have independent access to the res, but the owner may not have independent access? A. This question is very close. The usufructuary must have independent access. Whether the usufruct in rem is created if he has independent access and the owner also has independent access, that is open to doubt.

Q. You know of no cases on the subject? A. No. I mentioned a case in the direct examination which involved a transfer of property between husband and wife.

Q. That case related to a gift, did it not? A. Yes, I think it was a gift.

Q. It was not a transfer for value? A. No.

Q. Let us see if we can take this step by step. If the usufructuary and the owner have only joint access, in your opinion is that not sufficient to create the right in rem? A. If they have joint access?

Q. Only joint access. A. In my opinion that does not create the right in rem in favor of the usufructuary.

Q. If the usufructuary alone has access to the res does that create a usufruct in rem? A. Yes, it does.

Q. And if either the owner or the usufructuary has independent access, does that create a right in rem? A. That is open to doubt. My personal opinion is that this does not create a right in rem, although the case I mentioned may be held against me.

Q. Now, if the usufructuary has independent access, but the legal owner has access only if the usufructuary goes with him, does that create a right in rem? A. I think that is the case you have already mentioned because practically it means that they have joint access.

Q. No, I think you misunderstand me. I am now asking you of a case where if you are the usufructuary you at any time have the privilege alone of access to the res, but I as the owner have the privilege of access only if you and I go jointly. In other words, you can get it at any time by yourself, but I cannot without you. A. Now I understand. I think in this case a usufruct in rem is established.

Q. Do you know Dr. Eugen Meier, Dr. Gmuer? A. Yes, I know him.

Q. He is a Swiss lawyer, is he not? A. Yes, he is.

Q. Is it correct to say that under Swiss law when property is subject to a usufruct it is regarded as composed of two rights in rem? Let me explain that further—one consisting of the usufruct belonging to the usufructuary and the other consisting of the naked property belonging to the owner. A. That is correct.

Q. And in a certain sense when you have such a usufruct you have a division of the ownership rights, is that not correct, as distinguished from the legal title? A. Yes. I wouldn't say they are both ownership rights. There is only one ownership right, which cannot be split up, but the ownership right is reduced by the limited right in rem, which is not an ownership right but had been accorded to the usufructuary.

Q. Would you tell me whether you agree with this sentence I will read you, as an accurate statement of Swiss law. "In Swiss law, a division of ownership in the thing is effected if the ownership of the Usufruct is separate from the naked title." A. I do not think this statement is correct.

Q. Is it correct to say, Dr. Gmuer, that once you have a validly established usufruct in Swiss law, the legal owner has only a naked title? A. I think you can say that.

Q. Let me ask you, Dr., if you agree with the following statement of Swiss law. "The Nutzniessung, or Niessbrauch, is a so-called limited right in rem. That means that the full ownership is split into two rights. The one is the right that the so-called usufructuary has. He has the right to get the interest, fruits, he can administer the thing; if shares are the object of the usufruct, he has also the voting right. And the other right is the so-called Nude Proprietes. The Nude Proprietes belongs to the legal owner. He has the right to control that the usufructuary uses the capital gradually, and he will get back the full ownership if the usufruct comes to an end, because a usufruct can only be made to last for a lifetime."

> Mr. Baum: If counsel has no objection, I will show the witness the statement which I have just quoted to help him in his answer.
>
> Mr. Ennis: No objection.

A. I may first mention that it is written "Nuda Proprietas." I agree with this statement in essence, although I do not agree with certain terms applied in this statement. I think it isn't correct to say that the ownership is split. As I stated before, the ownership remains with the owner, but is reduced by a limited right in rem accorded to the usufructuary.

Q. Coming back for a moment to this concept of copossession we mentioned in the German law, do you understand that under German law it is sufficient to create a usufruct in rem if the usufructuary and the owner have joint possession and joint access to the res? A. No, I didn't mean that. I just said that a term of co-possession in the sense as, to my knowledge, it is applied under German law is not applied under Swiss law, but that is a theoretical discussion.

Q. I am trying to establish the difference, Doctor. If we were to assume that under German law if you have a usufruct in a piece of tangible property of which I am the owner and we hold it jointly in a safe or in a locked box to which we both have keys, that that would create a usufruct in rem, would it be your testimony that the Swiss law is different? A. I don't know what the situation is under German law.

Q. I asked you to assume that that is the German law. We are not saying that that is correct or not. Assume that is the German law. Is the Swiss law different from that? A. The Swiss law is different, as I see it.

Q. Now, looking specifically to a usufruct in shares of corporate stock, under Swiss law if A is the owner of certain shares of corporate stock which are in a safe deposit box in a Swiss bank and A agrees to create a usufruct and hands the key to the safe deposit box to the usufructuary whom we may call B, and B has the right of access to that safe deposit box and not A, would that create a valid usufruct in rem under Swiss law? A. Yes, it would.

Q. Would it make any difference in the situation which I have just described, if instead of giving the key to B, the usufructuary, and the right of access, A gave the key to an agent of B, who was his agent for the purpose of the usufruct, and this agent had the right of access to the box on behalf of B— A. B alone?

Q. B alone. A. That would create a valid usufruct.

Q. So it would make no difference? A. No.

Q. In other words, the possession by an agent of the usufruct is as good as the possession by the usufructuary himself? A. That is correct.

Q. Now, changing the facts just slightly again, if this agent has the right of access to the box not alone, but only in connection with a third person known as C, but C is exclusively subject to the control and direction of this agent, would it make any difference in your answer? A. No, it wouldn't.

Q. It would still be a valid usufruct in rem. So the fact that the agent would have to take C along to open the box when he had power to tell C, give orders to C, would not make any difference. A. No it wouldn't.

Q. I would like to read to you, Dr., a question and answer and ask you whether you agree with the statement of Swiss law contained in the answer. The question is: Suppose that the corpus of the gift is in the nature of bearer shares of stock, and that these bearer shares of stock were located in a safe deposit box. What would be required under Swiss law in order to give the usufructuary possession?" And the answer: "You have to give the key of the safe deposit box to the usufructuary or to his agent." Would you agree with the statement? A. Yes.

Q. I would like to read you another question and answer: "Well, suppose for example that there is only one key, and the usufructuary keeps that key?" Answer: "The usufructuary keeps the key, that's O.K." Do you agree with that statement? A. It is a key to a safe deposit box in a bank?

Q. In which the shares are located. A. And is the safe deposit box in the name of the owner or the usufructuary?

Q. That is not stated, Dr. If you feel you cannot answer the question on the basis of what I have read you, you have the right to say so. A. I cannot answer that question because the facts are not complete.

Q. A further question and answer: "He is given the key, right?" Answer: "He is given the key; then the usufruct is established, because the usufructuary can take out the shares and exercise all rights of a possessor." Do you agree with that statement? A. I can't agree with it without having a full statement of the fact regarding especially the question of who was the lessee of the safe deposit box.

Q. I would like to read you one more question. "Suppose there are two keys, and the donee or the owner keeps one, and the usufructuary gets the other?" Answer: "That is still sufficient because still the usufructuary can exercise his rights." Do you agree with that statement? A. No, I don't agree with it, for the same reason.

Q. This question and answer: "The delivery of the key is delivery of possession in Swiss law?" Answer: "Exactly, yes." Do you agree with that statement? A. I can only agree if the box is in a bank and if either the usufructuary is the lessee or if the owner is the lessee but has granted a power of attorney to the usufructuary; and even then I think it is doubtful whether the usufruct in rem has been established, although the case I have mentioned before could be held against me.

Q. Keeping in mind, Dr., the statements, questions and answers that I have just read you, assume that for the purpose of your next answer the box is leased by the owner, but the owner gives to the usufructuary or his agent the right of access to the box and retains for himself no right of access, what would be your answer then? A. That is impossible, because the lessee has always access to the safe. He may not be physically in position because he hasn't got the key.

Q. Can one in Switzerland lease a safe deposit box and agree with the bank that only Mr. X, not the lessee shall have access to that box? A. That can only be made on the basis of a power of attorney the lessee gives to the other person.

Q. Isn't that a matter of private contract, Dr.? A. Well, the bank will ask for a written document.

Q. Suppose I wanted to lease a safe deposit box in a Swiss bank and I go to the bank and I say I am going to pay for this box as lessee, but it is understood that I am to have no right of access to the box, that only Mr. A is to have a right of access and I hereby empower you to allow Mr. A and no one else to enter this box. Is there anything in that that violates Swiss law? A. I think it doesn't violate Swiss law.

Q. It is possible to do it then, if you wished, legally? A. I think it is legally possible, but the bank would not accept such a set up.

Q. You're just speculating on what the bank would do? A. Yes, because the banks always want to have a clear cut situation.

Q. Would it help if I as the lessee filed with the bank a power of attorney giving Mr. A exclusive right to access to the Box? A. Yes.

Q. That would be all right? A. Yes.

Q. Even though I was excluded from it by my express written statement? A. Yes, but I would always be in position to revoke the power of attorney and claim access.

Q. Just one more question and answer I would like to read to you, Dr., and ask you to express your opinion as to the accuracy under Swiss law of the answer. The question is as follows: "Did I correctly understand you to say that in connection with the creation of a usufruct in Switzerland, if shares which are the object of the usufruct, if the shares are placed in a box and the key to the box delivered to a third party who is the agent of the usufructuary, and he agrees to hold the key as agent for the usufructuary, that that is valid delivery and brings the usufruct into immediate existence?" The answer is: "That is it exactly." Do you agree with that statement, Dr.? A. Yes, I fully agree, if the key means the sole key and if the box is just a box and not a safe deposit box in a bank.

Q. And if it were a safe deposit box that was being talked about in that question would it change your answer? A. It would change it, because the key alone would not give access to the safe deposit box to the agent of the usufructuary.

Q. I believe you testified, did you not, that the agreement pursuant to which a usufruct is created need not be in writing and may be oral? A. That is correct.

Q. And I believe you also testified that although it was your opinion that where the shares are in the safe deposit box in the name of the owner and the owner gives a power of attorney to the usufructuary to have access to the box, that in your opinion that was not sufficient to create a usufruct, a revocable power of attorney? A. That is my personal opinion.

Intervener's Exhibit 18 for Identification

Deposition of Dr. Paul F. W. Gmuer—Cross

Q. And it is also correct that you can cite no decision which supports that view? A. No, I can't.

Q. Now as to the rights of the usufructuary, assuming a valid usufruct is created. We are no longer concerning ourselves with the formalities of creation, but just assume it has been created. I believe you said that the usufructuary is entitled to the income, the use and the disposition of the property, is that correct? A. Yes, much more.

Q. Much more, and if the res consists of shares of stock, that entitles him to attend the stockholders' meetings and vote the shares as if he were the stockholder; is that correct? A. Yes, it is correct, in so far as the relationship between stockholder and the corporation is concerned.

Q. In other words, as far as the corporation is concerned, he is in fact substituted as stockholder for the legal owner? A. He is the representative of the owner.

Q. Now, in voting the shares, if the usufructuary wants to vote them in favor of a proposal which is brought before the meeting and the legal owner wishes to vote them against the proposal, whose voice is decisive? A. The vote of the usufructuary.

Q. In other words, as far as the corporation is concerned, once a valid usufruct is created the corporation cannot recognize the vote of the legal owner? A. No, it can't.

Q. Unless he has been deputized to vote? A. Yes.

Q. And in the absence of any such specific authority from the usufructuary, it is the usufructuary alone who is the recognized voting representative for the shares? A. That is correct.

Q. Assuming you have a Swiss corporation and a usufruct in all of the shares of the corporation, do I understand from your previous statements that in effect the usufructuary has complete voting control over the corporation as long as the usufruct continues? A. That is correct.

Q. And if instead of a usufruct in all of the shares, he had a usufruct in only 97 out of 100 shares, he would still have complete voting control of the corporation, would he not? A. That is correct, subject of course to an action brought by the owner to invalidate any specific resolution taken in the shareholders' meeting.

Q. I am coming to that, Dr. Now, under Swiss law, is there any legal prohibition against a corporation making a gift of its property to a third party? A. No.

Q. Provided it is validly decided by the organs of the corporation? A. Yes.

Q. And if in a hypothetical case where there was a usufruct on 97 out of 100 shares of a Swiss corporation, if the stockholders meeting for what it considered a valid reason decided to give away the assets or a part of the assets of the corporation, the usufructuary could vote for such a proposal; is that correct? A. That is correct.

Q. And of course in the same facts, the usufructuary could vote to sell a part of the assets of the corporation for money, for value received, could he not? A. Yes, he could.

Q. And he could vote to change the assets of the corporation from one kind of security to another kind of security if he thought it advisable, could he not? A. Yes, he could.

Q. And under Swiss law it is true, is it not, that the stockholders' meeting is the supreme body of the corporation? A. That is correct.

Q. And the stockholders' meeting has absolute power over the appointment of the members of the administrative board; is that correct? A. That is correct.

Q. And is it not also correct that the stockholders at a duly constituted meeting may at any time remove members of the administrative board? A. That is correct.

Q. So that it can be said that the members of the administrative board hold office only at the pleasure of the stockholders, or only so long as the stockholders allow them to hold office? A. Yes, in essence this is correct.

Q. Now, coming to this action you referred to to invalidate a corporate resolution, is it not correct, Dr., that such a resolution could be invalidated by a stockholder only if it was violative of some provision of Swiss law? A. No, not only that; also if it was in violation of the provisions of the articles.

Q. Of the articles? A. Yes.

Q. But if it is in conformity with Swiss law and in conformity with the articles of incorporation, as we call them, could a resolution of a stockholders' meeting be challenged in a Swiss court? A. If it was in accordance with the law and with the articles—it is very often challenged.

Q. Successfully? A. Usually unsuccessfully, if the resolution was taken in full accordance with the law and the articles.

Q. Coming to a specific case, Dr., let us suppose that the stockholders of a corporation in their general meeting decide to invest a part of their capital in a certain business, that they are permitted by Swiss law and by the articles to make such an investment, but one of the stockholders thinks that the investment is an unwise one. Can he successfully challenge the resolution in a Swiss court because he disagrees with the action of his fellow stockholders?

A. He could not successfully do so if the resolution was in accordance with the law and the articles.

Q. And since I assumed in my question to you that it was in accordance with those, then your answer would be no? A. No.

Q. In other words, Dr., a Swiss court in an action brought by the stockholder to challenge a resolution adopted by the stockholders will not substitute its judgment or its opinion as to the advisability of a business investment for the judgment and opinion of the stockholders, so long as the action by the stockholders is authorized by law and by the articles of incorporation? A. That is correct.

Q. These questions I have asked you, would they also be applicable in a case where the stock of the corporation has been voted by a usufructuary under a valid usufruct and the vote by the usufructuary does not violate Swiss law or the articles of incorporation? A. That is correct.

Q. Now, as to the declaration of dividends, if you have a usufruct in stock of a Swiss corporation and the corporation has profits which it has earned, the usufructuary can vote his share for a declaration of a dividend by the corporation, can he not? A. Yes, he can.

Q. And if the declaration of a dividend is validly adopted by the stockholders' meeting, then the dividend will be payable to the usufructuary, is that correct? A. That is correct.

Q. And I assume correctly, do I not, that in connection with dividends the usufructuary can always vote his stock so that no dividend will be declared if he so wishes; isn't that correct? A. Of course he can.

Q. And there is no prohibition in Swiss law, is there, against a corporation accumulating too much profits without declaring dividends? A. No, there are not.

Q. And am I also not correct, Dr., that most of these cases in which actions have been brought to challenge the validity of the resolution of the stockholders are cases where some legal or formal requirement of law or of the articles of incorporation, such as failure to give proper notice of the meeting, lack of a quorum of stockholders at the meeting and similar defects are present? A. That is correct.

Q. Now, suppose the stockholders in their meeting voted for a declaration of a dividend and one of the stockholders contended that the declaration of this dividend did not leave the corporation with enough working capital, but suppose further that the declaration of the dividend did not violate any provision of Swiss law or of the articles of incorporation, could the resolution declaring the dividend be successfully challenged? A. I don't think so.

Q. So that here again the Swiss court would not attempt, in the absence of any violation of Swiss law or of the articles, to substitute its judgment as to what is a sufficient working capital, for the judgment of the stockholders? A. I think it would not.

Q. And would your answer be the same where the stock is voted by a usufructuary under a valid usufruct? A. Yes, it would be the same.

Q. Now, I believe you stated, Dr., that the usufructuary has no right to the assets of the corporation, is that correct? A. That is correct.

Q. And is it not true that your answer is based upon the fact that under Swiss law no stockholder of a corporation has any rights to specific assets of the corporation? A. That is correct.

Q. And that the rights of a stockholder under Swiss law are merely to share in the profits and to receive a distribution of the assets upon the dissolution or termination of the corporation? A. That is correct—and the right to vote.

Q. And the right to vote. My question was addressed specifically in terms of assets, as to the property rights therein; and your answer is yes. A. (Nods affirmatively.)

Q. So that when you said that a usufructuary has no right to the assets you weren't saying that because of his position as a usufructuary, but merely on the basis of general law applicable to all stockholders? A. Yes, he cannot have more right than the stockholders.

Q. Now, did I understand you correctly to say, Doctor, that the loss of possession by the usufructuary would terminate the usufruct in rem? A. That is correct.

Q. If there has been such a loss of possession, the usufructuary nevertheless still has a right of usufruct against the legal owner in personam, does he not? A. Yes, he has a claim to re-establish the usufruct unless he has renounced it when he lost the possession.

Q. Assuming there has been no renunciation, if the usufructuary after a loss of possession goes to the legal owner and says, "Redeliver possession to me," and the owner refuses to do so, he can bring an action in court to compel the owner to re-establish the usufruct, can he not? A. That is correct.

Q. And in the absence of any other facts than those which I have just given you, the court would enter an appropriate order or decree directing the owner to re-establish the usufruct, would it not? A. Yes.

Q. And this right that the usufructuary has under these facts to the re-establishment of the usufruct is an unconditional one, is it not? A. It depends upon the agreement between the parties.

Q. In the absence of any other facts than those you have before you. A. Yes.

Q. In other words, unless there is something in the agreement which says otherwise, there is no condition precedent to the re-establishment of the usufruct, is that correct? A. Yes, that is correct, unless the res fructuaria was lost.

Q. But if it is still in existence in the hands of the owner? A. Yes.

Q. If the agreement providing for the usufruct merely says, "I, the owner, agree to give you a usufruct for your life," possession is given pursuant to that agreement, possession is then lost by the usufructuary; is there any condition under those facts upon the usufructuary's rights to compel the owner thereafter to re-establish the usufruct? A. I don't think there is.

Q. Because the agreement says nothing; is that correct? A. Yes, that is it.

Q. And I assume correctly, do I not, Doctor, that Swiss courts in such a case would merely look at the agreement to see what governs the case? A. Yes, if the agreement is in writing.

Q. If in writing, yes. A. And they would ask whether there was not an oral agreement amending the written agreement.

Q. Now let me give you another hypothetical case, Dr. Let us suppose there is an agreement between father and son in which the son agrees to establish a usufruct in favor of the father for life. The property which is the subject of the usufruct consists of shares of stock in a Swiss corporation. The shares of stock are in a safe deposit box in a Swiss bank. The owner delivers the key to the box and the sole right of access to an agent of the father. Some time thereafter the father's agent takes the shares out of the box and keeps them in his own office. Is there a valid usufruct at that point? A. Yes, there is.

Q. Whether or not the delivery of the key created a valid usufruct, the taking of the shares into the sole possession of the father's agent certainly did; is that not correct? A. That is correct.

Q. In the same situation, Dr., would it change your answer if instead of the agent taking the shares into his personal possession he takes the shares and gives them to a banking firm of which he is the managing director and in which the owner has no interest whatsoever? A. Well, then I think the facts are incomplete. It makes no difference whether he has a personal interest in that bank or not. The bank is considered to be a third party.

Q. Let me put it this way. Suppose this agent takes the shares out of the box and gives them to this banking firm of which he happens to be the managing director, whether that is important or not, and says, "Hold these shares for me." Would there be a valid usufruct? A. Yes.

Q. Would it make any difference in your last answer if instead of saying, "Hold these shares for me," he says, "Put these shares in an account in the name of X, but I am the only one who has the right to take them out of that account." A. It wouldn't change the situation.

Q. Now, Dr., assume you have this agent who holds these shares which are the subject of the usufruct and he, with the consent of his principal, agrees for purposes of avoiding certain taxes in the United States to deliver these shares to another Swiss bank for the account of certain customers of that Swiss bank, under an agreement which provides that the customers of that other bank are never to receive the shares, that he is never to receive the purchase price stipulated for the shares, that either party to the transaction may at any time cancel it, and that he is to retain all the voting rights of the shares. Would that destroy the usufruct? A. I don't think so.

Q. Why don't you think that would destroy the usufruct? A. Because the usufructuary, through his agent, maintains full control of the shares and he also maintains the voting rights.

Q. Even if we were to assume, Dr., that the usufructuary's agent made a complete sale of the shares, retaining no rights, and then later repurchased the shares from the former purchasers and then he again acquired sole possession of the res, would the usufruct be established at that point? A. Yes, it would be lost and would then be re-established.

Q. And again, if upon this repurchase of the shares the usufructuary's agent put the shares back in the same bank for him we were talking about before and said, "Hold them for me," the usufruct would again be re-established; is that correct? A. That is correct.

Q. And the same answer if he said, "Put them in account on your books in the name of X, but I have sole access to them"? A. That is correct.

Q. It would still be a valid usufruct? A. Yes.

Q. And isn't it true, Dr., that the only practical difference under Swiss law between a usufruct in rem and a usufruct in personam or a personal claim to the establishment of a usufruct, is the procedural step of compelling the owner to establish possession? A. The only question is whether the usufructuary actually has possession or not.

Q. What I am trying to get at, Dr., and I may not have made myself clear, is—I realize of course that until it is established in rem, he does not have all the rights—but in the case of a personal claim the only thing he has to do is compel the owner to give him possession? A. Compel him by judgment and then enforce the judgment.

Q. And the Swiss court will enforce its own judgment, will it not? A. By a special procedure probably, yes.

Q. What I mean to say is, if a Swiss court orders the owner to do it, the owner cannot just say to the Swiss court, "I will not do what you tell me to do"? A. There will be sanctions, of course.

Q. And these sanctions which the Swiss court applies are designed for the purpose of enforcing compliance? A. Yes.

Q. Now, I believe you said, did you not, that the right of usufruct itself is never assignable? A. That is correct.

Q. But that the usufructuary can assign in effect the exercise of the right to a third party? A. That is correct.

Q. And I believe you also said that that would be true unless there was something in the agreement which made it non-assignable? A. That's open to doubt, whether by agreement you can avoid assignability.

Q. In any event, Doctor, if a son agrees with his father to establish a usufruct in certain property which had previously been given to the son by his father, and that is all the agreement says, is there anything in that that would prohibit the usufructuary from assigning the exercise of the usufruct? A. No.

Q. And in the case of a usufruct in a claim to a sum of money or to a debt, is it not correct that since you obviously cannot deliver a debt, what you must do is say, "I herewith transfer to you my claim against the debtor"? A. And this must be in writing in order to be valid.

Q. Can a usufructuary of shares in a Swiss corporation assign to another individual his right to vote the shares? A. Yes, he can, unless the articles say that shares can only be voted by a shareholder. The representation of shares is freely assignable unless the articles provide to the contrary.

Q. In other words, unless the articles say that the shares must be voted by the shareholders personally? A. Yes.

Q. And if the articles do not so provide, there would be no legal obstacle to the assignment of the voting rights by the usufructuary? A. No—well, I would say not the assigning of the voting rights, but the exercise of the voting rights. He can give power of attorney to somebody else to vote the stock. Of course, the usufructuary cannot assign the voting rights to somebody else because the law just says that he represents the shares, but he can give power of attorney to anybody else.

Q. He can appoint an agent to vote the shares on behalf of the usufructuary? A. Yes.

Q. In your testimony concerning the conflict of laws rules that would be applied by a Swiss court, I believe you said that in the case of shares located in Switzerland and the question of a usufruct in those shares, the Swiss courts would apply Swiss law? A. That is correct.

Q. Suppose the shares were not in Switzerland, although they were shares of a Swiss corporation; would the Swiss court still apply Swiss law? A. No, it would not.

Q. It would apply the law of the situs of the shares? A. That is correct.

Q. Let us suppose, Doctor, that a case arises in a Swiss court concerning a usufruct in shares of a Swiss corporation and the shares are in Switzerland, and this is a question of a usufruct in favor of the father, to be created by the son, the owner; and the son states to the court that, "I delivered these shares to an agent of my father, who was his agent for the purpose of the usufruct, with the understanding that he would hold them under the usufruct, and I accomplished this delivery by giving to that agent the only key to the safe deposit box in Switzerland in which the shares were kept and the only right of access to that box; and by these acts I intended to create a usufruct in favor of my father." What would the Swiss court say as to whether or not a valid usufruct had been created? A. I think it would say that the usufruct had been validly created.

Q. In rem? A. In rem.

Mr. Baum: No further questions.

Redirect Examination by Mr. Ennis:

Q. Dr. Gmuer, as I recall, one of the last questions Mr. Baum asked you was whether the Swiss courts would hold a usufruct was established if the son gave in Switzerland his father's agent the sole key to the box in which the shares were kept. I do not recall whether as part of that hypothetical statement it was stated that the legal owner, the son, retained separate access to the box when he gave separate access to the father's agent. But if the son did retain such access, would the Swiss courts hold that the usufruct had been established, if they both had separate access? A. But it was only one key.

Q. Yes, in that hypothetical case, there was one key. A. I think the courts would hold that the usufruct was established, because the sole means of access, although theoretically the access existed also for the owner, the sole means of access was given to the usufructuary.

Q. Suppose that box was a safe deposit box in a bank and suppose the legal owner had access to the box, whether he had a key or not. Suppose the bank would give him access to his box whether or not he had a key? A. If he maintained separate access either through a key or otherwise, it is doubtful whether a Swiss court would hold that there is a valid usufruct in rem.

Q. Now suppose there were two keys and the legal owner retained one and gave one to the usufructuary's agent? A. I think we have to distinguish two cases. If the usufructuary's agent and the owner were joint lessees of the box and the agent of the usufructuary had separate access and had a key, I think the court would hold that the usufruct had been validly established. But if the owner was the lessee and the usufructuary's agent held his key, the second key, under a power of attorney, there are some doubts whether the usufruct was validly established. As I stated several times, my opponent would probably hold the case of the husband and wife against me; but I would anyway maintain my view that the usufruct was not validly established, and I think with a fairly good chance of success.

Q. Did you state in your direct testimony how you would distinguish the husband and wife case? A. Yes, I would say the husband and wife case refers first of all to a transfer of ownership, and secondly the relationship between husband and wife is a special relationship whereby generally the husband retains the administration and management of the wife's property.

Q. You testified that under Swiss law the right to exercise a usufruct could be transferred by certain operation of law such as bankruptcy. How would the trustee in bankruptcy or the representative of the court or the government in bankruptcy—whatever he would be called—exercise that assignment by operation of law against the legal owner? A. In answering this question I assume that the usufructuary is domiciled in Switzerland, otherwise bankruptcy proceedings would not be instituted in Switzerland. Assuming this, the procedure would, as confirmed by several cases, be the following. The trustee in bankruptcy would establish a permanent administration of the objects of the usufruct. Permanent means until the end of the usufruct. And he would cash the dividends, if the res fructuaria were shares, and turn them over to the creditors.

Q. Suppose the usufructuary was bankrupt in Germany. Could his German trustee in bankruptcy successfully assert in the Swiss courts that he was entitled to the fruits of the usufruct? A. That is a very tricky question of international bankruptcy law. The rule is that the bankruptcy in one country does not entail bankruptcy in another country, but is strictly territorial; and to my knowledge—I haven't studied this question now—there is no treaty between Switzerland and Germany to the effect that German bankruptcy would extend also to Switzerland.

Q. I believe Mr. Baum asked you whether a usufructuary could appoint an agent to represent him at the annual meeting of a corporation in which the usufructuary held the usufruct in the shares of that corporation. A. That is correct.

Q. And I believe you answered that that might be done. A. Yes.

Q. Under Swiss law could that be oral, or for purposes of Swiss corporate law would the agent have to have some written authorization or power of attorney? A. This would depend upon the articles of incorporation. Where a corporation has bearer shares, the legitimation of the one who exercises the voting rights is usually established by presenting the share certificates which are to bearer, so the bearer is considered to be the one who has the voting rights; or the shares are deposited with a bank appointed by the corporation, which bank issues an admission card to the general meeting in the name of the one who deposited the shares or the one who was appointed by the depositor of the shares to represent him at the meeting.

Q. I believe another hypothetical question asked by Mr. Baum was whether a usufructuary would maintain his usufruct in shares of a Swiss corporation if the usufructuary's agent deposited them in a bank, as he put it, to the name of Mr. X, but on a condition that they were only at the disposal of the usufructuary's agent, and you said that it could be maintained. A. Yes.

Q. Would your answer be different if that agent deposited them in the bank for the account of the legal owner? A. This would terminate the usufruct in rem.

Mr. Baum: With or without the right of access in the usufructuary's agent?

A. That is another question. I was asked what the situation was if the agent deposited them for the account of the owner. That means it was a new account established in the name of the owner, and the owner had solely access to this account.

Q. As I recall, Dr. Gmuer, you testified both on direct and cross-examination that a usufructuary in the shares of the corporation would have no usufruct in the assets of the corporation. A. That is correct.

Q. Could the usufructuary and the corporation by agreement create a usufruct in the assets of the corporation? A. Of course it could, but in order to be validly established it must be established for each asset separately.

Q. By delivering possession of the assets? A. Possession of the assets to the usufructuary, that's right. But this would be an agreement between the corporation and the usufructuary really, not between the owner of the corporation's shares and the usufructuary.

Q. Under Swiss law is it possible for the legal owner to terminate a usufruct in Swiss shares by paying a usufructuary any value for his interest? A. There are no cases on the subject. Our doctrine admits a transformation of a usufruct into annuities, and further this right to transform the usufruct into annuities is given to the owner exclusively. This theory has been developed by Leemann in his Commentary which I have mentioned before, Edition 1925, page 477 and 478. Leemann definitely states that where the usufruct grants to the usufructuary a pecuniary interest, which is the case with a usufruct on shares, that in such a case the owner has the right to transform the usufruct and by so doing terminate it, by giving the usufructuary an annuity.

Q. The giving of such annuity would terminate the usufruct in the corporate shares? A. Yes.

Q. Under this doctrine does the legal owner of the shares have the right to do this without the consent of the usufructuary, or only with his consent? A. Without the consent of the usufructuary, and the usufructuary is not entitled to demand such transformation.

Q. Did I understand you to say on cross-examination, Dr. Gmuer, in answer to a question by Mr. Baum, that if the usufructuary with possession of Swiss corporate shares subject to the usufruct sold them and then repurchased them, the usufructuary obtaining repossession of the shares, that the usufruct in rem would be established? A. Would be re-established.

Q. Would be re-established. A. That is correct.

Q. Suppose instead of the usufructuary selling the shares the legal owner sold the shares with the usufructuary's consent, and the legal owner repurchased the shares and the shares were then held upon repurchase in a bank account for the account of the legal owner solely. Would the usufruct be lost, or if not lost by the sale, would it be re-established? A. It would be lost by the sale and not be re-established.

Mr. Ennis: No further questions.

Recross Examination by Mr. Baum:

Q. Dr. Gmuer, Mr. Ennis asked you just a minute ago whether if the legal owner sold the shares and the legal owner repurchased them the usufruct would be re-established, and I believe you said it would not, it would have been lost and not re-established. A. That is correct.

Q. What would be your answer if the shares were in an account in the name of the legal owner but the usufructuary's agent sold the shares acting in the name of this legal owner, and the usufructuary's agent re-acquired the shares and again put them in an account in the name of the legal owner, but the agent had the sole right of access to the shares? Would the sale result in a loss of the usufruct under such facts? A. If I understand your question correctly, the agent of the usufructuary never lost control of the shares; and if this assumption is correct that he never lost control of the shares, then I cannot see how the usufruct was terminated.

Q. Even if the usufructuary's agent lost control of the shares for a period of years but if the usufructuary's agent repurchased the same shares from the holders and again put them in an account in the name of the owner, but retaining to himself, the agent, the sole right of access to the shares, would the usufruct be re-established? A. I think so.

Q. So that it is true, is it not, Dr. Gmuer, that the name in which the shares are held is not the decisive factor, but it is the question of who has the sole access to them, sole possession—is that not so? A. I didn't use the word access in this connection, but where you have an account with a bank, what is material is who has the right of disposition over the shares.

Q. And if the usufructuary's agent is the person who has that right of disposition, no matter in whose name the account may be, that is the thing that determines, it is not? A. Yes, that is correct.

Q. And if it is the usufructuary's agent that has that right of disposition, then his possession is the possession of the usufructuary; is that not correct? A. That is correct.

Q. I believe you said that a corporation could establish by agreement a usufruct in the assets of a corporation; is that not correct? A. Yes, theoretically it could.

Q. Would not such an agreement, if made by a Swiss corporation, be made by the members of the administrative board? A. Yes, by the organs, members of the adminstrative board.

Q. They have the power to do it? A. Yes.

Q. I believe you also said in response to Mr. Ennis' question, that in the case of a Swiss corporation with bearer shares, it is the usual practice to recognize the person who comes into the meeting with the shares as the person entitled to vote them; is that correct? A. That is correct.

Q. And as long as that person has the shares and says, "I am entitled to vote," that is the end of the corporation's inquiry into the matter? A. Yes.

Q. Now let us assume that corporate shares which are subject to a usufruct are in a safe deposit box, the sole access to which is in the agent of the usufructuary, and this agent for each stockholders' meeting takes the shares out of the box, brings them to the meeting and votes them. By bringing the shares to the meeting he would be recognized as the person entitled to vote, would he not? A. That is correct, unless the articles provide to the contrary.

Q. And in the facts I have just given you, it wouldn't make any difference, would it, whether or not the corporation had any knowledge of whether there was a usufruct in those shares? A. No.

Q. And that is for the reason that since this agent is coming in with the shares and they are bearer shares, he is the person entitled to vote. A. That is correct.

Q. So it is possible, is it not, to have a usufruct in Swiss shares and to have them voted for a period of years by an agent of the usufructuary without the other stockholders or members of the administrative board of the corporation ever knowing that a usufruct in those shares had ever been created? A. Yes, I think generally speaking, that is correct, but in a corporation with a limited number of stockholders or practically only one stockholder I cannot imagine that the members of the board would ignore the existence of a usufruct.

Q. But let us assume that the legal owner of the shares never tells anyone in the corporation that he has created this usufruct, and that the usufrucutary's agent never tells anyone in the corporation that he is the agent under the usufruct, and as long as the agent comes into the stockholders' meeting with those shares it is theoretically and legally possible that he could be voting those shares each year or more than once each year by presentation of the shares without anyone else in the corporation knowing about it; is that not true? A. That is true.

Q. Now I believe you said that this question of a bankruptcy of the usufructuary in Germany presented some ticklish questions of international law. A. Yes.

Q. And that there was no treaty on the subject between Germany and Switzerland. A. No.

Q. Is it legally possible therefore that if the usufructuary who is domiciled in Germany is declared bankrupt by a German court, he personally or his agent could nevertheless come into Switzerland and vote the shares of a

Swiss corporation of which he is the usufructuary? A. That is correct.

Q. Getting back for a moment to the creation of a usufruct, does it make any difference under Swiss law, if all requirements of delivery and possession are observed, whether or not the usufructuary is domiciled in Germany? A. It makes no difference.

Q. As long as proper delivery and possession are given to the usufructuary and his agent, he could live in China as far as Swiss law is concerned? A. Yes. And the shares are still located in Switzerland.

Q. That's right. A. Yes.

Q. And that would certainly be true, would it not, where the usufructuary is domiciled in Germany but his agent who holds the shares is in Switzerland? A. It would not change the situation.

Q. There would certainly then be no obstacle to the creation of a valid usufruct? A. No, it would not.

Q. In connection with this question of a safe deposit box, I believe you said that it was of some importance as to who leased the box. What if the shares were put in the safe deposit box leased in the name of the legal owner, but the lease was made under the direction of the usufructuary's agent and with money supplied by the usufructuary's agent and the agent had sole access to the box? Would the fact that the shares were located in a box under such circumstances be sufficient to create a usufruct in rem? A. If I understand your question correctly, the owner who was appointed lessee with the bank by the agent did not even know about it. He didn't take any action himself.

Q. That is not what I meant. Let me try and clarify it.

Let us assume that father and son agree that the son will create a usufruct in shares which are in Switzerland. The father or the father's agent says to the son, "You are to lease in your name a safe deposit box for which I or my agent will give you the money. You will sign the lease agreement in your own name, but you will have no further rights of access to that safe deposit box and the sole right of access will be to Mr. X, the agent. Would the possession of the shares in the safe deposit box under those facts create a valid usufruct in rem? A. Yes, I think if what the owner and the usufructuary's agent agreed upon is accepted by the bank that would create a valid usufruct, but I doubt very much whether the bank would accept that.

Q. But that is a matter of banking practice? A. Yes.

Q. The purpose of my question, as I hope you understood, was that in the situation which I put to you the lease in the name of the owner was merely a formal lease and the owner had no real interest in the box. My question was designed to have you state whether in such circumstances such a lease would bar the creation of a usufruct in rem. A. No, I don't think it would.

Q. I believe you also testified that the fact that the owner and the usufructuary's agent had a key to the box might affect the creation of a valid usufruct, did you not? A. Yes, I had doubts whether this created a valid usufruct.

Q. Let us suppose that the bank when the lease was originally executed issued two keys to the box, but that as a matter of fact it is proven that only one key exists and has existed for a large number of years, and that the sole key is held by the usufructuary's agent, who has sole access to the box. Would there be a valid usufruct in rem created? A. I doubt it very much.

Q. On what basis? A. Because the right of access of the usufructuary's agent is not involved in the possession of the key alone, but also in the power of attorney the lessee has given to him, which power of attorney he can revoke at any time, thus depriving the agent of the right of access although he may still hold a key.

Q. What would a Swiss court hold if in fact it was proven to it that the agent exercised for a period of over ten years the right of sole access to the box and that the legal owner never attempted or did ever have any right of access to the box pursuant to a usufruct agreement? A. I think that if the owner never had a right of access the court would definitely hold that the usufruct was validly established, but if he never exercised the right the question is still open; but there is probability that as to the past the court would hold that a valid usufruct had been existing.

Mr. Baum: No further questions.

Further Redirect Examination by Mr. Ennis:

Q. Doctor, did you ever hear of the lessee of a safe deposit box in a Swiss bank not having access to it? A. I cannot imagine that this would ever be the case.

Q. Whether he had a key or not? A. The lessee is considered by the bank as the one who has the right of access. Whether he exercises such right or not makes no difference because he is the lessee, and any other person having a power of attorney would be considered as deriving his right from the lessee.

Q. Just one more question, Doctor. In the hypothetical question Mr. Baum asked you about the agent of the usufructuary placing the shares on repurchase, I think it was, in an account in the name of the owner but retaining sole access to the account, at one point he mentioned that the agent was the managing director of the bank in which the shares were placed; and I think you said there was a distinction between the bank and it managing director. If in that hypothetical case the shares were placed in an account at the disposition of the legal owner, would the mere fact that the usufructuary's agent was managing director of the bank give him sole access to the account? A. No.

Q. Who would have sole disposition of the account? A. The owner of the account.

Mr. Ennis: No further questions.

Further Recross Examination by Mr. Baum:

Q. One question, Doctor. In the question Mr. Ennis just put to you about the safe deposit box in the name of the owner, you said that the lessee has the right of access to a safe deposit box. Would it make any difference under Swiss law as to determining the creation of the usufruct if the usufructuary and the owner by agreement between them had expressly agreed that the owner was not to have any right of access to the safe deposit box leased in the name of the owner? A. A usufruct cannot be established by agreement alone. There must be transfer of possession and you cannot exclude transfer of possession by agreement.

Q. No, but if the shares are placed in a safe deposit box in the name of the owner with the right of access in the usufructuary's agent, and the lessee by agreement with the usufructuary voluntarily gives up the right of access, which he otherwise would have had under the law, to the box, isn't that sufficient, to make the possession of the shares in the box for the sole access of the agent, sufficient to create a valid usufruct? A. I doubt it very much.

Q. On what grounds? A. Because the usufructuary's agent cannot prevent the lessee from going there, so they have not actually established a situation where it is no longer possible for the owner to have access to the safe.

Q. In other words, Doctor, are you saying that in spite of the fact that by agreement the owner has surrendered all right of access to the res by agreement with the usufructuary, that the Swiss courts would ignore that agreement? A. I cannot positively state that they would. I don't know what they would decide, but I think that since a third party is involved, the bank, such agreement would only have the effect wanted if the bank were advised of it and the bank would then change in the name of the lessee.

Q. And if the bank were so advised that would remove your doubts? A. Yes, the bank would then exclude the owner from access.

Mr. Baum: No further questions.
Mr. Ennis: No further questions.

Defendant's Exhibit 118

MILITARY INTELLIGENCE DIVISION W. D. G. S.
BOMIS

MILITARY ATTACHE REPORT Germany
(Country reported on)

I. G. No. 4310 x4470

Subject Interview with Fritz VON OPEL
(Brief descriptive title)

From Miami, Florida Report No. 104 Date 3 June 1943

Source and degree of reliability:

FRITZ VON OPEL, member of Opel car firm, Germany, now citizen of Lichtenstein, interned in Miami by U.S. Immigration Service.

A-2

SUMMARY.—Here enter careful summary of report, containing substance succinctly stated; include important facts, names, places, dates, etc.

1. Bombing of S K F plant; FISCHER A.G. plant; and FICHTEL & SACHS plant, in vicinity of SCHWEINFURTH, suggested. Also, bombing of control dams of Riber MAIN.

2. Subject states has considerable knowledge of Island of SYLT.

3. Subject states that he considers high German army officers more devoted to profession than to Hitler; might accept task of fighting Japanese for United Nations.

4. Subject invented rocket car, widely publicized in 1929; claims to have considerable information on rockets.

Intervener's Exhibit 18 for Identification

5. Subject captain of Swiss skiing clubs; claims to have invention for improving skis to prevent injury to skiers.

Fritz Von Opel, member of the Opel car firm, in Germany, was brought to this office by an agent of the Immigration Service, and was interviewed regarding some proposals which he decided to make in order to improve his situation. Mr. Von Opel has been in the hands of the Immigration Service for a long time, and at one time was confined at Miami for five months. He is having a rehearing in an effort to be released from surveillance or confinement in an internment camp.

1. Subject stated that 60 to 70% of the ball-bearing and roller-bearing production in Germany seems to be centered in the North Bavarian city of Schweinfurth, on the River Main, about thirty miles West of Wuerzburg. The largest plant is the S K F plant, in the center of Schweinfurth. The second plant is the Fischer A.G. plant, in the Western outskirts of the town. In this area also lies the new plant of Fichtel & Sachs, the firm which formerly owned the S K F plant, and which now is engaged in making motors, clutches, brakes and automotive equipment — and perhaps munitions as well. On account of the highly critical requirements for ball-bearings and roller-bearings in all airplanes and tanks, the destruction of these three factories would be a serious detriment to the Nazi war production.

Subject also called attention to the scheme for maintaining high water on the River Main, from Bamberg down to the river mouth, by the use of dams and gates, of light construction, near Bamberg, Aschaffenburg, Schwanheim and Kostheim. During the summer low water, the destruction of these gates would serve to stop all traffic on the MAIN. Subject claims to have invented a special bomb which would be useful in connection with the destruction of such dams — one exploding when it is stopped and tilted by the current against an obstacle; another, when it is stopped by an obstacle and armed by the rotation of a water wheel.

It is possible that the S K F company in Philadelphia may have accurate locations of the above-mentioned plants in the town of SCHWEINFURTH, and some knowledge of the navigation of the MAIN River, as this plant's files contain information on all the S K F plants in the world.

Subject called attention to the fact that the rough balls furnished to these plants were manufactured in a plant on the EGER River, near the town of EGER, in Czechoslovakia. This plant manufactures the rough balls from Swedish iron and is the main source of supply to all plants in Germany, as far as subject can remember.

2. Subject was questioned at length concerning his knowledge of Germany, but he professed to have traveled very little except in Switzerland and the United States. His wife, who was born near HAMBURG, was raised at a summer place on the Island of SYLT, in the North Sea off the coast of Denmark. The summer house was located near the South end of this island. Subject himself, after being married, spent a good many years on the island of SYLT. He is well acquainted with the seaplane base that was being built there in 1939, and has been informed of considerable air developments in this vicinity since 1939. He said that his wife had ridden all over the island on horseback, and could make a statement regarding any place on it, but that he had no maps in his possession. He believes the island

Intervener's Exhibit 18 for Identification

of SYLT could be taken from the Germans readily, if sufficient air power were sent there. He never had been to HELGOLAND, however, and was not aware of how much this island protected SYLT.

3. When asked regarding the possibility of German surrender, subject stated that he thought that if the professional soldiers of Germany — particularly the higher army officers and navy commanders — were offered the job of fighting the Japanese, and guaranteed continuous employment at this job for some time, in policing the seas, that they would be willing to desert Hitler and, even, to turn on him. He did not doubt that they could carry their crews with them, in spite of the Hitler myth which is so prominently displayed everywhere. He didn't believe that any of the older commanders were very loyal to Hitler — once his invincibility was shown to be a myth, too. He proposed that many of the commanders captured in Tunis be indoctrinated in this country with the power of the United States, and secretly dropped in Germany to negotiate with the Army commanders. He seemed to believe in this fantastic scheme.

4. Subject was well known in 1928-1929 as the inventor of the Opel rocket car, and he claims to have obtained considerable knowledge of rockets from his experience with this car. He claims to be the only one ever to have flown with rocket propulsion. He discussed the "bazooka" at considerable length, and appeared to have read much about it — claiming that it must be of the hollow-rocket design — which was invented in Germany by his co-workman, Mr. Sander, during the experiments on the rocket car.

5. Informant also claimed to have been an expert skier, in Switzerland, having led certain organizations there and

Intervener's Exhibit 18 for Identification

having been president of a skiers organization at St. Moritz. He claims to have invented a device by means of which a ski can be released during a fall, preventing the breaking of legs, and has tried out the device sufficiently to know that it is worth a great deal. He would be willing to transmit his device to any officer who has a knowledge of skiing and is connected with the ski troops.

Mr. Von Opel was asked about a number of other places in the vicinity of his home, near MAINZ, in Germany, but was unable to furnish any information of value. Contact can be made with him if further information is desired which might be at his command.

CHARLES G. METTLER
Colonel, Ord. Dept.
Chief

Defendant's Exhibit 119

MILITARY INTELLIGENCE DIVISION W. D. G. S.
MILITARY ATTACHE REPORT
(Country reported on)

Subject Fritz von Opel I. G. No. ....
(Brief descriptive title)

From Bomis, Miami Report No. 225 Date 17 July 1943

Source and degree of reliability:

Fritz von Opel, former maker of Opel cars, Germany, now a citizen of Lichtenstein, at present interned in Miami by U.S. Immigration Service. A-1

SUMMARY.—Here enter careful summary of report, containing substance succinctly stated; include important facts, names, places, dates, etc.

Brought under guard to Bomis offices, subject described the successive phases of his experience with rockets and their uses.

Experiments begun in 1928 for publicity purposes, resulting, with the collaboration of Opel's inventor, Sander, in various practical devices for throwing lines to ships, throwing telephone lines across valleys, etc.

Rocket car developed, using standard Opel chassis, receiving wide publicity.

Subject formed partnership with Sander to continue experiments. Rocket plane developed and given trial flight.

Opel Company sold out to General Motors in 1929, subject receiving 10% of stock in Germany. Came to U.S. and worked with General Knudsen until 1931, then was in charge of Antwerp General Motors plant. Transferred stock to New York, whereupon Nazis investigated transfer

Defendant's Exhibit 119

and fined relatives therefor. Subject became citizen of Lichtenstein, later returning to U.S.

Sander employed by Germany Army 1931-1934 for secret rocket experiments, later imprisoned until his death in 1937.

Nazis seized plant in 1935; subject discontinued work with rocket development.

Subject does not believe probability of long-range rocket bombardment of cities, but believes practicability of rockets for throwing wire in front of planes in order to injure them.

Subject worried over fate of family in Germany and fate of Germany after the war. Has pending appeal from internment, but Board of Appeal could not come to a decision on his case and it was referred to immigration authorities in Washington.

Referring to our previous report no. 104, June 3, 1943, on the above subject and teletype no. 4589 dated July 14, 1943, from this office on rockets.

Upon request of MIS, Fritz von Opel was contacted through the immigration authorities at Miami and was brought under guard to Bomis offices, where he answered freely many questions on the subject of his experience with rockets and their uses.

The informant stated that he began the investigation of rockets in Germany in 1928 for the purpose of publicity for the Opel car, a light car imitating the Ford car development in the United States. He advertised for a person familiar with rocket developments and at first obtained a longhaired professor who had a scheme to travel to the moon by rocket propulsion. He talked to this man for some

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time and asked him to produce certain results which he could not produce. He found that he knew nothing whatever on the practical side of rockets, but was only a dreamer. He later blew himself up in attempting to produce some propulsion by means of rockets, not knowing sufficient information about explosives.

Mr. Opel then employed a Mr. Sander, who operated a small plant at a place called Wesermunde, near Bremerhaven. This man apparently knew more about explosives and rocket mixtures than any other German Opel had ever met. With Opel he developed a small pistol apparatus for throwing lines to ships from docks, a small charge discharging the rocket carrying the line and the rocket mixture propelling the rocket onto the ship's deck. This device became quite valuable. Sander then produced a similar device for throwing telephone lines across Swiss valleys and later produced some of these pistols for electrical transmission companies. He also produced some pistols of a different model on the same principle for lifesaving apparatus, throwing lines to wrecked ships.

Opel employed this man in 1928 and 1929 to experiment with rockets for the propulsion of an automobile using a standard Opel chassis. Many experiments were conducted with solid and liquid fuels which finally resulted in a hollow rocket. A number of hollow rockets were then fastened by a proper fixture to an Opel car chassis and Fritz von Opel drove this car through the streets of Frankfort, Germany, and other places, as an advertising stunt, receiving great publicity. He then contracted with Sander to form a partnership, and Opel invested 80 to 90 thousand marks in the rocket business. He financed Sander to develop sufficient rockets to propel a plane. They produced a catapult to launch the plane some 12 meters long, using fixed rocket discharges to give the plane an initial velocity of nearly 150 kilometers per hour on the catapult. After many unsuccessful trials with different types of fuel, the plane was eventually launched. The plane was equipped with twenty large hollow rockets ignited in succession from the cockpit by the operator himself. Mr. Opel flew the plane at a small airport near Frankfort.

Nicholas von Sittert, a brother of the von Sittert now in the British Cabinet, and Herr Heinckel, the airplane inventor, were present at the flight. The plane took the air and flew for 35 seconds for about two miles around the airport. The President of Frankfort sent an order out forbidding the flight just before it was made, on the ground that the rockets were likely to ignite buildings in the vicinity, but the commander of the airport allowed him to fly within the airport in spite of the prohibition. Mr. Opel then requested his inventor to go ahead with the plans for developing rockets to propel a plane across the English Channel, and further experiments were made with liquid fuel, with rocket catapults, and with propelling rockets.

The Opel Company sold out the Opel Manufacturing Company and the Opel car developments to the General Motors Company of the United States in May, 1929. Mr. Opel then left Germany for the United States and worked with General Knudsen until 1931, learning the General Motors business. He then became agent in charge of the Antwerp plant and served nine months in Antwerp with the General Motors organization. Under the terms of the sale, Fritz Opel received 10% of the stock in Germany. He returned to the United States. When the British pound was depreciated he had his stock all transferred to New York and there received for it $3,700,000.00. This was more than his share, but he had the stock transferred in order to save the gold value of the stock. The German Government very shortly afterward investigated the transfer. Later the Nazis held a trial of Fritz von Opel's father and uncle. The uncle was fined 5 million RM and the father was fined 3 million RM, 8 million RM in all. The uncle became very angry with the Nazis and in order to be rid of the whole business, wrote a check for the 5 million reichsmarks. Fritz von Opel advised his father to defer payments as much as possible, and secured an arraignment whereby the father paid only 250,000 RM as initial payment, allowing subsequent payments to be made at intervals of six months to a year. The Nazis passed a law shortly thereafter cancelling all deferred debts of this nature, intending it to apply only to small debts. Taking advantage of this law, his father avoided further payments and the uncle became extremely angry over the situation, causing a rift in the family.

Fritz von Opel then went to Lichtenstein and acquired a new citizenship in order to avoid Nazi oppression, and later returned to the United States.

In the meantime, the German Army employed his partner, Sander, to work on several secret development projects involving the use of rockets. Opel was not allowed to visit the plant nor to learn the nature of these experiments. These occurred from 1931 to 1934. Opel frequently returned to Germany and discussed the plant with Sander, particularly the financial arrangements. Sander was later imprisoned by the German Army for the sale of certain rockets containing a new development, to the Italian Government. While in jail he was given a contract by the Navy Department of Germany for special developments for naval use, but was not allowed to carry out the Navy contract. Sander eventually died in prison about 1937.

Defendant's Exhibit 119

The plant and all property of the company was seized by the Nazis about 1935. All company secrets were obtained from drawings and descriptions in the safes of the company and turned over to another fireworks company which continued the developments. Opel did nothing thereafter with the development of rockets.

Referring to many experiments conducted by Opel and Sander, Opel stated that he did not believe there was any probability of any long-range bombardment of cities by rockets because rocket mixtures had to carry four times the weight of the fuel in oxygen, while a gasoline engine could obtain its oxygen from the air. It appeared to him impossible to use air oxygen in any rocket principle after many experiments. The most powerful arrangement that was developed consisted of a large apparatus similar to a blow torch using benzol in one tank and various types of nitrous oxide in the other, pumping them together to an ignition chamber where gas was formed and ejected to propel the apparatus. At that time he was unable to secure suitable pumps for the various commercial nitrous oxides used, on account of corrosion. However, he stated that they were able to obtain a lifting pressure of eight tons, reported to him by Sander.

The final development, which proved most successful, was a hollow rocket with a properly proportioned core of burning material which approximated, when burning, the ideal of a constant pressure. Opel stated that the core was easily supported by metal rods and that the rocket was easily ignited in the cylindrical volume between the core and the exterior.

Opel believes that a proper development of rockets for throwing wire in front of planes in order to foul propellors

Defendant's Exhibit 119

and injure the edges of wings is highly practicable. He believes rockets can be made to carry wire above the present ceiling of any plane.

The conversation developed the fact that Opel was very much worried over the fate of his family in Germany, his father, his uncles and other relatives. He has spent most of his time in internment working on plans to save Germany from the fury of her enemies in defeat. He has proposed many fantastic schemes. He now proposes that Germany be made a state of the United States of America and have all its foreign representation vested in the Washington Government. All his schemes apparently depend upon protection of the German people by the United States.

Opel himself is nervous, worried and very talkative. He lives with his wife under guard of the border patrol of the Immigration Service in Miami, and can be reached at any time.

He has pending an appeal from internment. It is understood from intelligence sources that the Board of Appeal was tied two to two with respect to his release, and the case has been referred to immigration authorities in Washington. Opel insists that the case will be decided in his favor before the end of July.

Opel gives the impression of being more interested in Germany than the United States, of having a violent hatred of the Nazis on account of family persecution, and also of having a high opinion of the superiority of the German race.

Charles G. Mettler
Colonel, Ord. Dept.
Chief, BOMIS

Defendant's Exhibit 120

MILITARY INTELLIGENCE DIVISION W. D. G. S.
BOMIS Report ....
(Country reported on)

Subject Fritz von Opel I. G. No. ....
(Brief descriptive title)

From BOMIS, Miami Date 18 September 1943
Report No. 301

Source and degree of reliability:

Fritz von Opel, German alien now being interned at Miami, Florida, brought to BOMIS office September 15th at his own request. Supplementing BOMIS Reports 104 (6-3-43), 281 (9-2-43) and 282 (9-2-43)
Reliability: C-2

Summary.—Here enter careful summary of report, containing substance succinctly stated; include important facts, names, places, dates, etc.

1. Manuscript of Von Opel book (copy being made) will be forwarded separately.

2. Subject states he is known as anti-Nazi, therefore persecuted by Nazi Germans interned with him at Seagoville, Tex. before coming to Miami. Reasons given: (1) he advised his father, upon investigating National Socialist party before it came into power, to oppose Nazi regime. (2) he had withdrawn part of family fortune from Germany and brought it to America—for which his father was accused of economic treason and fined heavily.

3. Subject is known as a diploma engineer. Spends time, now, thinking over new designs and new methods concerning all automotive development; has submitted a number of ideas regarding war machines; has been granted a

Defendant's Exhibit 120

number of U.S. patent claims; has sufficient experience to know whether his inventions can be used practicably.

4. Inventions and proposed inventions: (1) position-finder for coastwise navigation. (2) floating mine for destroying pontoon bridges and dams. (3) mechanism for counting automobiles on road which can be applied to a rocket bomb to make it explode close to a target without direct contact and without use of a timing device. (4) parachute-suspended air mine. (5) mechanism for clearing mine fields of non-metallic mines.

5. Request made to intern subject at Miami or near Washington, in order that he may be contacted for further information. As previous suggestions by him have not been received with any credibility, he at present shows some reticence in giving information. It is believed he has considerable information on German installations which has not yet been obtained.

Mr. Fritz von Opel, a German alien now being interned at Miami, Florida, was brought to this office on September 15th (at his own request) for the purpose of discussing some of the things about Germany which were on his mind, and to correct the booklet which he has written and which has been in the possession of this office.

1. Manuscript of the von Opel book will be copied, and copy sent separately. It is an interesting study of German reasoning.

2. Subject stated that he had been interned at Seagoville, Texas, with a group of Nazi Germans who were extremely hostile to him and to Mrs. von Opel—making life miserable

for them; that, accordingly, he preferred some place other than Seagoville for internment—protesting, meanwhile, that he is a good democrat and should not be interned at all.

He stated that the reason for the hostility of the Nazis was that his father was an admirer of Streseman, the Foreign Minister of Germany, and when Streseman passed out, it was difficult for the father to decide which party to select. Accordingly, he sent Fritz to investigate the National Socialist Party, which was then quite new. Fritz went to Munich and listened to the National Socialist Party speakers for several days—finding them to be a group of impracticable dreamers who advanced all sorts of harebrained theories and promises. One of the absurd ones, he said, was a plan to do away with high-tension lines in Germany, putting all generated electricity into water, separating the water into hydrogen and oxygen, and piping the hydrogen to all German kitchens for fuel, and to all industries for heat and power generation. Fritz von Opel contradicted this particular speaker—calling attention to the explosive quality of hydrogen and the difficulty of handling it . . . and practically was thrown out of the meeting.

After hearing several other impractical proposals, he reported to his father that the Nazi group was led by harebrained fanatics, and, under no circumstances, to follow them. The father took Fritz' advice and opposed the Nazi regime. When the Nazis came into power, Fritz had taken his part of the family fortune to America—and, apparently, some of the rest of the fortune, also. For this, his father was accused of economic treason, and had to pay a fine of eight million reichsmarks. The father also criticized the expense

Defendant's Exhibit 120

of a yacht presented by a group of manufacturers to Hitler. He was required to apologize.

Fritz himself paid a German hauptman (Nazi leader) 180 thousand reichsmarks to desist from the persecution of his family. On account of these experiences, he states that he is known as an anti-Nazi, and is persecuted by the Nazis whenever they find it possible.

3. Subject has had much to do with research connected with the Opel motor car, and with all automotive developments. He is known as a diploma engineer in Germany. He spends a great deal of time, now, thinking over new designs and new methods, and has submitted a number of ideas regarding war machines. He has a number of patent claims granted in the United States. Subject is by no means a dreaming inventor, but has sufficient experience to know whether his inventions may be used practicably. His ideas appear to be worth investigating at greater length.

4. One of his inventions is a position-finder for coastwise navigation—which enables an untrained person to locate a ship's position, automatically, from the observation of known shore points. It is an interesting apparatus.

Subject submitted a description of a floating mine (for destroying pontoon bridges and dams) to the Navy Department, but received no consideration. A copy of this description is furnished herewith, for consideration.

Fritz von Opel has had considerable experience with rockets. He feels certain that he could develop a device by means of which a rocket bomb could be made to explode close to any target, without direct contact and without the use of a timing device. He states that he already has in-

Defendant's Exhibit 120

vented and produced a device along this line for operating a mechanism for counting automobiles on the road—using the electric affect of the charged body of the automobile passing close to a short-wave radio receiver. He states he has a patent on this device and knows how it may be applied to a rocket bomb passing in the neighborhood of the charged body of a plane. It is believed that this device merits investigation, for this or for other purposes.

He also has proposed a parachute-suspended air mine —operated similarly to his rocket bomb; and has developed, to some extent, an idea for clearing mine fields of nonmetallic mines.

5. Fritz von Opel has been interned for a considerable period, and now is in a somewhat nervous state. As previous suggestions by him have not been received with any credibility, he has been reticent in the matter of giving information, and apparently has considerable information on German installations which has not yet been obtained. The Immigration authorities have been requested to intern him in Miami, on near Washington, in order that he may be contacted for further information. It is probably possible to obtain other information of value.

/s/ CHARLES G METTLER
CHARLES G. METTLER
Colonel, Ord. Dept.
Chief, BOMIS

Defendant's Exhibit 120

Description

At present the only means to destroy pontoon-bridges is either artillery fire or bombing by airplanes. However as the target is very small and the target area protected by anti aircraft fire or fighter planes, efficient bombing or even observation for the direction of the artillery fire is—if not impossible—very costly. An occasional hit must be considered as a rare instance and the few pontoons destroyed can easily be replaced or patched up.

The method and the devices suggested hereinafter makes the bridging of a river for all practical purposes impossible. It allows to cover the target with an unending succession of dead-center hits and this by day or by night, through fog or smoke screens. Moreover the charges by which the bridge is blown up can be placed outside of the protected target area without the necessity of any accuracy or any observation, either by hand, by mortars, by planes or even by automatic devices which do not need any operators and which cannot be detected or destructed.

The underlying idea is the use of floating mines which—set adrift upstream of the bridge-area—drift downstream and must unavoidably hit against the target. The crux of this invention is a new method of igniting floating mines, a method which requires neither an impact as do the present horn-type mines nor the presence of a mass of iron as do the present magnetic mines but which uses the action of the river current itself. The very moment the mine touches an obstacle the river current begins to act against it either by deflecting the tube shaped mine out of its perpendicular drifting position or by putting in rotation a waterwheel or pressing against a flap hinged to the mine. In the first (and most practical) case the mine (Fig. 1) consists of a cylindrical tube 1 containing the charge 2, the float 3 and the detonator compartment 4. The detonator device (Fig. II) consists of a dry cell 5, the detonator cap 6 and a safety switch 7, which can be closed through downward action of the membrane 8. The latter which at the same time shuts off the detonator compartment against the outside water on account of its springyness tends to close the switch 7 but is temporarily blocked by a piece of watersolvent matter 9 (f.i. sugar, carbide). Within the circuit lies the main-switch 10 consisting of a round glass vessel 11 filled with quicksilver 12 and carrying on its circular sides one above the other two metal rings 13 and 14 which if bridged by the quicksilver close the circuit from 5 to 6.

It is part of the invention to arrange the center of gravity only slightly below the metacentrum which can be accomplished by proper distribution of weights or additional weights (f.i. on top of the float) or additional floats (f.i. at the lower end of the mine) thus giving to the floating mine only a slight amount of stability while afloat. The mine operates as follows:

After being thrown into the river, the mine drifts downstreams in its perpendicular position. The water meanwhile dissolves the matter 9 and the expanding membrane closes the safety-switch 7. The moment the mine touches an object it gets by action of the current deflected out of its perpendicular position, the quicksilver rolls over to the contacts 13-14, the circuit is closed and the detonator explodes the mine.

Instead of the switch 10 any similar switch which is sensitive to a change by deflection can be used for instance a switch consisting of a pendulum within a contact ring.

Defendant's Exhibit 120

Instead of using the action of the river current for making the mine list purpose of deflecting and thus igniting the mine it is possible (but less practical) to let the river current turn a waterwheel preferably one of the anemometer type (half balls). In this case the mine should have a low center of gravity and thus sufficient stability. The waterwheel should work in a plane parallel to the water surfact so that it can operate in whatever position the mine takes around its longitudinal axis. The axle of the waterwheel can be geared to close an electric contact or to ignite the mine mechanically (f.i. by breaking an acid container).

To prevent the waterwheel from spinning while the mine is dropped and not yet fully adrift the rotation can temporarily be prohibited by an obstructing watersolvent pin. As this type of mine when dropped by planes hits the water lower end first it is recommended to cover the waterwheel with a streamlined cap which may be fastened to the mine by watersolvent means and which drops off after the mine is securely adrift.

(Instead of a waterwheel it is possible—but not recommended to use hinged flaps which when deflected by the water pressure close the electric circuit.)

Against this type of mines no counter action seems possible. The drifting mine can hardly be seen and cannot be sunk or be ignited by machinegun fire as the float is involnerable and the charge and all delicate parts are well below the surface. If—for the protection of the bridge—a wire is strung across the river the first mine stopped would explode immediately, destroying the wire and thus opening the way for the following mines.

Defendant's Exhibit 120

As the release of the mines does not require any accuracy it seems feasible to bury on the river bottom an automatic device which either releases mines in pre-determined intervals or which can be operated from ashore.

The same type of mine can be used against traffic in rivers and lakes. The "sweeping" of such mines should be extremely difficult because they cannot be destroyed by machine-gun fire but explode immediately when touched by the sweeping gear destroying the latter.

To make the removal of such mines even more hazardous it is recommended to parallel the main switch 10 (fig 2) by a second switch designed to operate under a change of pressure, for instance a switch operated by a membrane-box. When submerged the membrane would be compressed and the circuit open.

If one should try to lift the mine out of the water the membrane would expand, the circuit closed (by passing the open main-switch 10) and the mine explodes.

Fritz v. Opel
Seagoville, Oct. 13, 42

Defendant's Exhibit 121

FAMILY NAME and FIRST NAME, PERSONAL STATUS, OCCUPATION	DATE OF BIRTH	RELIGION	NAME, OCCUPATION, RELIGION, DATE OF BIRTH and DEATH of PARENTS
Lueddeckens, Ilse nee Brach	10-25-03	Hebrew	Felix and Berta nee Kleve Businessman last residence in Berlin.
Not entitled for the time being to use the double name Lueddeckens-Alexander	PLACE OF BIRTH		
	Luebeck		
An entry in the Civil Status Registry of Hanover			Marriage contracted 8-28-28 at the Civil Status Registry, Berlin-Frienau No. 390
Werner Louis George Lueddeckens died 10-30-1945 in Berlin Civil Status Registry, Berlin-Charlottenburg No. 6942/45	4-3-88	Protestant	
	Hanover		

Nationality: German

Arrival at and Departure From	Residence	Landlord
10-23-52	Herrnstrasse 11 (4th floor)	own

Residences of Past Years, Certificate of Change of Residence, Purpose of Residence

Came from Neuhaus, near Schliersee, according to report of departure of 8-25-1952

Identification Papers Issued

Identity Card, Munich, Gruenwald No. B 559-614
Issued on 3-9-1950 by the District Chief, Munich

First card entries made: 10-23-1952

Signed on ....

(sgd) Ilse Lueddeckens

Defendant's Exhibit 122

Zuerich, Grand Hotel Dolder
September 22, 1939

Dear Doctor von Napolski:

I acknowledge receipt of your kind letter of September 20th in the matter of the Boat House Association, and I agree with your letter in all respects. I may add that we agreed that, to begin with, I am to take over the interest payment for 2 years.

May I ask you to request the payment in question from the banking house Adler & Co., St. Peterstr. 1 6, to which address you will kindly also send the share certificates. The bank has already been informed accordingly. It will probably be best if you exercise the right to vote.

It was a pleasure to me to be able to serve you, and I shall also be glad to give you advice and assistance in other matters.

With best regards,

Yours

ADLER & CO., BANKERS
Incorporated

Cable-address: Bankadler
Teletype: Zürich 235
Telephone: 39700

Zürich, December 1, 1945
St. Peterstrasse 16

Overseas Finance
Corporation Limited,
Liestal.

Defendant's Exhibit 122

We hereby inform you that we have passed the following entries on your account: u.u.r.

DEBIT	AS PER		AS PER	CREDIT
		Credit per postal check from the Messrs. Dr. A. Crendelmeir, Dr. Walter Baechi & Dr. W. Koenig, Stampfenbachstr. 12, Zürich, for your account, in favor of Mr. Fritz von Opel for 9 cooperative shares of the German Rowing Club or rather the Boat House Association of the German Rowing Club in liquidation.	Dec. 3, 1945	Fr. 900.—
Fr. 3,000.—		our payment by postal check of today for your account to the Graubündner Kantonalbank, Chur, for credit on the Mortgage Account No. 34262 B, according to the letter of Mr. Gäng of November 30, 1945.		[stamp]: Entered:
" 2.—		our costs		[initials]
Fr. 3,002.—today.				

Yours very truly,

ADLER & CO.
Incorporated

P.S. We are debiting you for the shares on Deposit Account.

[2 signatures—illegible]

Defendant's Exhibit 123

Berlin, July 2, 1936

Fritz von Opel
Certified Engineer

Geheimrat Dr. Wilhelm von Opel
Rüsselsheim.

My dear Father:

In accordance with your wish, I had a discussion yesterday and today with Mr. Deku regarding the new transaction and at today's discussion Miss Frentzel was also present.

Since the matter is of far-reaching importance, and I would not like to make a decision alone, I am giving you in the following a resumé of the discussion with Mr. Deku, broken down into four aspects:

1) Technical aspects of investment
2) Possibility of financing
3) Technical execution of the transaction
4) My personal opinion of the transaction

1) Technical aspects of investment

A risk is not involved at all in this transaction, because you do get a guarantee of purchase in return for a purchase price which, in itself, is high, that is, the Reich has the obligation, beginning January 1, 1937, to reimburse you for the amount paid by you, at your request, against delivery of the securities. Therefore, a loss of invested capital cannot occur at all.

At this point I want to emphasize that the Reich does not act as seller, as you believe, but as buyer through us, so

Defendant's Exhibit 123

to speak, because the Reich has in its possession an option from a third party for the purchase of the 30 million shares at 25%.

As far as the interest is concerned, the Reich assumes the obligation to pay 5% interest on the total amount, which interest is to be paid quarterly. Since the Reich will provide a loan for at least half the amount at 4%—to which I will refer again below—we would receive an interest rate of approximately 6% on the capital to be expended by us for the purchase of the second half, after the deduction of costs. In view of the above interest guarantee, it would be understood as a matter of course that we are not entitled to any dividends which may be distributed. However, Mr. Deku hopes to be able to obtain the additional privilege that we may keep a portion of the dividends distributed, which, of course, represents an important attraction on the interest side. In the opinion of Mr. Deku this additional interest can only be expected if a dividend of more than 5% is distributed.

From the standpoint of economics, this is, so to say, a loan granted to the Reich on favorable conditions, in which you have a chance to profit from a possible rise in prices by a direct sale in the market, if the Reich does not want to go beyond its obligation to take over the securities at the purchase price of 25%.

2) Possibility of Financing

7½ million RM are necessary to finance the business. It is obvious that you yourself cannot furnish such an amount and that third parties must help in the financing.

As has already been mentioned above and will be described in detail later, approximately half the purchase

Defendant's Exhibit 123

price will be made available by a loan at 4%, so that for you it will only be necessary to finance the remaining amount of about 3.5—4 million RM.—After the old transaction has been settled, we shall receive about 1,800,000 RM from Mr. Deku after all existing credits with Mr. Deku directly or under your guarantee have been repaid. With this amount we can repay the debts to Arnhold in large part, so that we are completely clear on all sides with the exception of about 850,000 RM, which we owe to Arnhold and to the Reichskreditgesellschaft.

Furthermore, we must consider that we need a credit of another million to finance the purchase of the estate, because the Hesse loan, which is to be given in payment, amounts to only 2.1 million RM. Therefore, after the estate is paid for, we shall have a debt of a total of about 2 million.

The question now is whether you want to burden yourself with additional debts of 3.5 million to 4 million RM. This question is not so much one of an economic nature, since you will receive equivalent values, which are readily marketable, but rather a question of nerves, for which reason I want to leave the decision on this point to you alone exclusively.

I need not emphasize that it is, of course, not difficult to borrow this amount of 3½ to 4 million, since you will acquire for it, the new shipping securities which, of course, are acceptable as collateral in the full amount, in view of the obligation (of the Reich) to purchase them from you.

Mr. Deku rightly points out that perhaps another method of financing may have to be found because of the confidential nature of the transaction, but he is of the opinion that he will find it without any difficulty.

Defendant's Exhibit 123

3) Technical execution of the transaction

Mr. Deku considers it expedient that the credit to be used under the guarantee of the Reich should not be taken under your name but by the Union Bank, because you, as a non-banker, would, of course, be charged higher interest, according to the regulations.—There is no objection to this, naturally, because it has the advantage that you do not have to assume any obligations for this credit, while you are, of course, entitled to the rights in case of a possible sale of the securities, and, in addition, the 1% interest difference will be credited to you by the Union Bank. The second half of the shares at a face value of approximately 15 million will pass to you against payment of 25% and will be delivered to you.

To make the transaction technically secure the following four agreements are necessary:

1) Declaration of the Reich of its willingness in the period from January 1, 1937 to January 1, 1938, to take over, at a rate of 25%, up to a maximum of 30 million shipping shares, which may also be turned over in partial amounts and in successive deliveries.

2) Declaration of the Reich of its willingness to pay interest of 5% on the purchase price paid by us.

3) Declaration of the Union Bank that on the portion financed by the Union Bank,

   a) Geheimrat von Opel will receive the entire 1% difference in interest.

   b) Geheimrat von Opel will receive 75% of the total profit made in this half of the transaction.

Defendant's Exhibit 123

Your wish to appear in the business as a party contracting with the Reich, is to be satisfied in the following way:

It is understood that the Reich cannot make the contract with a private person but must make it with a bank. Therefore, the declarations listed under 1) and 2) are made to the Union Bank, while the Union Bank declares to the Reich that the transaction is only possible with your support. This declaration is in turn to be acknowledged and approved by the Reich.

4) My personal opinion of the transaction.

As already stated above, it is a question of nerves whether you want to seek the necessary new credit. I agree with Mr. Deku that the new transaction, even though perhaps not profitable, is, however, without risk, and that it should be undertaken, in order to prove to the Reich again that, contrary to some beliefs, the possibility to make great profits is by no means decisive for us, but that we—just as in the first shipping transactions—are willing to act in the interest of the Reich at any time.

Therefore, if you can make up your mind to seek the necessary credit, I should like to recommend that you conclude the transaction with the above provisos.

I dictated this letter in the presence of Mr. Deku and Miss Frentzel, as the outcome of our conference of today.

Awaiting your decision, I remain

with the kindest regards,

Yours

Agreed.

With best regards,

Yours

Defendant's Exhibit 124

Fritz von Opel,
Graduate Engineer.

Haus Kulm,
St. Moritz,
May 8, 1937.

Mr. Willy Meyer,
Receiver in Bankruptcy,
13-14 Schoenwalderstr.,
Berlin-Spandau.

Dear Mr. Meyer,

In the course of the hearing of the case against Deku in Darmstadt I heard from your own mouth, to my surprise, that the bankruptcy estate believes it has claims against me in the Bauxite affair. Since you mentioned these claims in the first days of the trial, I assume that you, like the court, have convinced yourself that such alleged claims against me are untenable, particularly since Professor Harrassowitz, who was called by the defense as a witness, tore to pieces the lying statements of Deku and his crony Fayer.

Enclosed I am sending you copies of the correspondence I had with the Union-Bank, or Deku, member of its Managing Board, concerning the Bauxite affair, this being the same material which I submitted to the court. From this material you will see that

1) Deku had an option from me to acquire, against payment of a certain sum in pengoes, 40% of the shares in a company to be founded by me, and that, since a foreign exchange license was not granted, said shares were not

Defendant's Exhibit 124

acquired (and, incidentally, nothing came of the founding of the company either).

2) I had offered Deku to take over the general agency for the Hungarian company, provided he assumed certain obligations (minimum purchases etc.). However, these obligations were not assumed by the Union-Bank, and consequently my offer was not accepted.

This correspondence thus reveals clearly, as I testified in court on oath, that no business relations whatever existed between Deku, or the Union Bank, and myself.

Thus, Deku's entire "creditable service" in the Bauxite matter consists in having introduced me to the two Jews, Fayer and Koranyi, both of whom I have reported to the police for embezzlement. A further service might perhaps be found in the fact that Deku had a geological expert opinion prepared in support of his application for a foreign exchange license for a fee of RM 2,000. This expert opinion, which contains only some general suggestions, was and is, of course, of no significance whatsoever for my purposes.

After you have been convinced, as I hope, by the above statements and the enclosed correspondence that no claims exist against me, may I ask you to give me written confirmation to that effect. You will understand that it offends my sense of order to leave such a matter in suspense.

With the German greeting.

Yours,

(s) Fritz v. Opel

[note in handwriting:]
See particularly Enclosure 7).

7 enclosures.

Defendant's Exhibit 124

Copy

Fritz von Opel
Graduate Engineer. at present: Hotel Majestic
Berlin.

October 16, 1935.

Mr. E. Deku
Berlin.

On behalf of the incorporators of the Ungaria Bauxit A.G. Budapest, which is in the process of being formed, I make you the following offer:

The incorporators of the above company are prepared to grant you, against a single payment of Pengoes 300,000.00, 15% of the capital stock of the company, to which there have been contributed all the rights to bauxite deposits in Hungary, Italy, and Dalmatia known to you. At the same time you will undertake to grant the company a 5% loan in the amount of Pengoes 500,000.00, by the terms of which you will have the right up to June 15, 1938, to acquire a further 25% of the nominal capital of the company by assigning this claim to the said incorporators. The said incorporators undertake to procure from the Hungarian government permission for the above-mentioned payments to be made in blocked pengoes. You, on the other hand, will undertake to establish a German sales company for the sale of the products of the above company, to which sales company we will grant the exclusive sales rights for our products in Germany. The said sales company shall undertake to conclude sales contracts for 60,000 tons for the first production year, beginning on March 1, 1936, and for at least 100,000 tons for the second and ensuing years.

Defendant's Exhibit 124

The said incorporators hereby declare their willingness to accept a person to be designated by you or the Managing Board of the company.

We have further noted the fact that you are willing to participate, in proportion to your shares in the company, in the furnishing of further funds which may possibly become necessary through the guaranteeing of payment deadlines, provided that the share payable by you shall not exceed Pengoes 2,000,000.00.

I reserve the right to withdraw the above offer up to October 20, 1935.

Copy.

1 Potsdamerplatz, Berlin W.9
October 16, 1935.

Mr. Fritz von Opel, Grad. Eng.,
present address: Hotel Majestic,
Berlin.

We have noted your offer of October 16, 1935.

We fully accept said offer, with the proviso, however, that we may revoke our acceptance until November, 1935 if we should not succeed by then in obtaining the required licenses from the government agencies here.

The clause in your offer, according to which you reserve until October 20th, 1935, the right to withdraw, disturbs us greatly, since, in order to keep within the applicable time limits, we naturally have to negotiate beforehand with the government agencies. It would therefore be greatly desirable if you would let us know as soon as possible the

Defendant's Exhibit 124

result of your conference with the other gentlemen of the incorporating group, so that we would not be repudiated afterwards.

In addition, we wish to point out that the obligations to accept delivery can be binding only in the event that this transfer should entail no legal complications, or in the event that for general economic reasons a relocation should be made to other markets.

With the German greeting,

Gesellschaft fuer Handels & Industrie-Beratung m.b.H.

/s/ Deku

Agreed:

(s) [illegible]

Copy.

Bauxit Vertriebsgesellschaft m.b.H.
The Chairman of the Supervisory Board.

[in handwriting:] 3

Columbushaus,
1 Potsdamerplatz,
Berlin W 9,
October 17, 1935.

Reich office for Foreign Exchange Control,
43 Behrenstr.,
Berlin W 8.

Attn.: Ministerialrat Dr. Landwehr.

As the undersigned respectfully informed you yesterday, the Bauxit Vertriebsgesellschaft m.b.H., Berlin, was established on October 16, 1935, with a capital of RM 500,000.

Defendant's Exhibit 124

The Bauxit Vertriebsgesellschaft m.b.H. now proposes to establish a subsidiary company in Budapest the shares of which will be held entirely by the German company. This Hungarian company is to be furnished with a capital of 1 million pengoes and in addition with a credit in the further amount of 1 million pengoes. The purpose of the company is participation in the Hungaria Bauxit A.G., Budapest, and the granting of credits to the latter.

With regard to the Hungaria Bauxit A.G., Mr. Fritz von Opel has made the following statement to us on behalf of the group incorporating the company:

The Hungaria Bauxit A.G. will be established with a capital stock of 2 million pengoes. It guarantees to us a participation of 40% of the nominal capital. We are obligated to participate through our Budapest subsidiary company in the further financing of the enterprise by granting loans. The Hungaria Bauxit A.G. has undertaken to obtain the permission of the Hungarian Government and the Hungarian National Bank for the use of blocked pengoes for these purposes.

Since the Dresdner Bank has ascertained that the Reichsbank is prepared to place at our disposal blocked pengoes, regardless of their nature and origin, for our purposes against payment in reichsmarks, we respectfully request you to grant us a license

1) to acquire 1,000,000 blocked pengoes and transfer them to Hungary for the purpose of establishing our Hungarian subsidiary company,

2) to acquire a further amount of 1,000,000 blocked pengoes and transfer them to our Budapest subsidiary company for the purpose of granting a loan to the

Defendant's Exhibit 124

Hungaria Bauxit A.G., Budapest. As far as can be foreseen, the latter amount will not be required until some time next year.

We have arranged with the officials of the Hungarian company that the contracts for all machines and tools required shall be placed in Germany exclusively. We request that you agree in principle to permit the German exporters concerned to export those goods under the subsidized export procedure.

We intend to make the amounts to be given by way of loan available in such a way that the Hungarian company shall be obligated to pay us through our Budapest subsidiary company a yearly payment of 100,000 pengoes including 5% interest. Payment of this annual amount shall be in the form of delivery of bauxite to Germany. The Hungaria Bauxit A.G. will undertake the obligation toward the German Bauxit Vertriebsgesellschaft m.b.H. that the loans made from Germany shall flow back in the form of bauxite deliveries in accordance with the aforementioned plan. In addition, for the observance of this undertaking Mr. Fritz von Opel is willing to undertake a guarantee against any deficiency.

BAUXIT

Vertriebsgesellschaft m.b.H.
/s/ Deku
as Chairman of the Supervisory Board

Defendant's Exhibit 124

Copy.

Fritz von Opel,
Graduate Engineer.

Berlin,
November 5, 1935.

Reich Officer for
Foreign Exchange Control,
Berlin W 8.

Attn: Ministerialrat Dr. Landwehr
and Regierungsrat Dr. Sayn.

Dear Mr. Ministerialrat:
Dear Mr. Regierungsrat:

I am taking the liberty of referring again to this morning's discussion in the matter of the license application of the Bauxit-vertriebsgesellschaft m.b.H. of October 17, 1935. I hope that in this connection my statements will contribute towards the further clarification of the matter.

As far as the economic side is concerned, I should again like to direct attention to the fact that the blocked pengoes in question will not be made available gratuitously. On the contrary, they must be purchased by the Bauxit-Vertriebsgesellschaft m.b.H. The partners of this company, however, are very much interested, for personal business reasons, in having the acquired blocked pengoes invested as profitably as possible.

As far as the foreign exchange side of the matter is concerned, it is my opinion that in this respect also there can hardly be any serious objections. From the foreign exchange standpoint, the licensed blocked pengoes will again benefit the German economy in the form of bauxite ship-

Defendant's Exhibit 124

ments, for which in other circumstances foreign exchange —presumably even blocked foreign exchange would not suffice for this purpose—would have to be used. The amortization of the entire authorized amount of blocked pengoes by shipments of bauxite will, in addition, be guaranteed by an obligation on the part of the Hungaria Bauxit A.G. towards the German Bauxit Vertriebsgesellschaft m.b.H. Over and above this, however, I have assumed a personal guaranty for the fulfillment of this obligation. I am aware of the fact that with this deficiency guaranty, I have assumed a risk of not only economically, but also from the foreign exchange standpoint, extraordinary proportions. However, I am prepared to do so because I am convinced of the private business success of the projected bauxite business and further because by assuming such an obligation I wished to completely eliminate all objections to the granting of a foreign exchange license.

For the reasons which I presented this morning I should be grateful to you if you would expedite the matter so that a decision can be rendered in the course of this week. Regardless of the nature of that decision, however, I do not wish to omit the statement that, even in the event of the participation of other circles, I shall continue to endeavor to safeguard German interests as far as possible.

Respectfully yours and with the German greeting,

/s/ Fritz von Opel.

Defendant's Exhibit 124

Copy

at present: Berlin.
November 30, 1935.

Fritz von Opel
Graduate Engineer

Bauxit Vertriebsgesellschaft m.b.H.
1 Potsdamer Platz,
Berlin W 9.

I acknowledge receipt of your letter in which you inform me that you are not in a position to participate in the Hungaria Bauxit-Gesellschaft in accordance with my proposal.

I confirm to you, however, our oral agreement pursuant to which I am prepared to grant you the exclusive sales rights for Germany on condition that you guarantee minimum sales of 100,000 tons per year.

On my part, I am prepared to accept any price which you can prove to be competitive and, over and above that, to grant you considerable price advantages. On the other hand, however, I wish to have nothing to do with the difficulties of clearing transactions and must therefore demand payment on delivery against presentation of bills of lading.

I shall consider myself bound by this offer up to December 31, 1935.

Naturally, I am giving you this information on behalf of the Hungaria Bauxit-Gesellschaft, Budapest.

With the German greeting

/s/ Fritz von Opel

Defendant's Exhibit 124

Copy.

Bauxit Vertriebsgesellschaft
m.b.H.

1 Potsdamer Platz,
Berlin W 8,
December 3, 1935.

Mr. Fritz von Opel,
graduate engineer,
present address, Berlin.

Thank you for your letter of November 30, 1935, the contents of which we have duly noted.

We are prepared in principle to accept your proposals, but must first try to obtain from the Reich Office for Foreign Exchange Control the licenses necessary to obtain the pengoe amounts.

Please inform the Hungaria-Bauxit A.G. accordingly.

With the German greeting!

Bauxit
Vertriebsgesellschaft m.b.H.
By order: /s/ Deku

Defendant's Exhibit 124

Copy.

Bauxit
Vertriebsgesellschaft m.b.H.

January 17, 1936.
Dr. D/G.

Regional Revenue Office,
Foreign Exchange Control Office,
28-36 Neue Koenigstr.,
Berlin C 2.

Herewith we beg to submit the following to you:

Our company was established in October, 1935. The purpose of the company was, among other things, to participate in the Hungaria Bauxit Aktiengesellschaft, Budapest. Negotiations had been started with the Reich Ministry of Economies for granting permission for the required pengoe amounts and promises had been made for a license therefor.

In order to examine objectively whether the participation in the Hungarian company was in the interest of Germany and profitable to our company, Professor Dr. Harrassowitz, a German geologist, was repeatedly sent to Hungary to make comprehensive geological examinations. The following payments were made to him as travel expenses and advances:

On October	17, 1935,	1 letter of credit	RM	504.00
" "	17, 1935,	for buying pengoes	"	47.00
" "	17, 1935,	ticket Berlin-Budapest	"	145.00
		sleeper	"	20.00
" November	12, 1935,	in cash	"	500.00
" November	21, 1935,	letter of credit	"	504.00
				RM1,721.30

Defendant's Exhibit 124

Since, owing to the prevailing foreign exchange situation, the Reich Office for Foreign Exchange Control denied, regretfully, the above mentioned application, a participation of our company in the Hungarian establishment became pointless. Accordingly, from the day the application was denied, we made no more payments with regard to this establishment, mainly because the Hungarian bauxite deposits and their exploitation were now exclusively in the hands of Mr. Fritz von Opel who is a non-resident of Germany within the meaning of the foreign exchange regulations, and of other persons unknown to us who are in the same status. Moreover, in reply to a request for payment made to us at a later date, we declared emphatically—particularly vis-a-vis Mr. Fritz von Opel—that for reasons of the foreign exchange regulations we would have to decline all further payments.

Now that the development outlined above has revealed that, failing the original purpose, the payments made served the interests of Mr. Fritz von Opel or foreign business associates exclusively, we consider it our duty to inform the Foreign Exchange Control Office of these events and, if necessary, to apply for a retroactive license for the payments made by us.

Defendant's Exhibit 125

Copy/Ma

at present: Hotel Majestic,
47 Brandenburgischestrasse,
Berlin-Wilmersdorf.
June 30, 1937.

The First Mayor of the State Capital, Dresden,
Dresden.

I have received from my father, Geheimrat Dr. Wilhelm von Opel, a copy of your letter addressed to him under date of May 14, 1937.

To the question asked therein as to who worked on my father's newly filed claims, I wish to reply that I worked on the claims and that, generally speaking, I represent my father for the entire matter. In this connection it is a matter of course that I have discussed the entire situation with various lawyers, particularly with lawyers who are banking experts.

You will admit that in this situation I have no choice but to prosecute my contested claims in court, especially since no one so far has furnished me any reasons why there should exist the slightest doubt in a favorable outcome of such litigation.

I hope you will agree with me that the proper step for me to take is to sue the City of Dresden first, since, if I succeed in that suit, the receiver in bankruptcy will withdraw his objections in view of the right of recovery which I would have against him. For if I sued the receiver, the estate would incur very considerable costs, which will be avoided if I first bring action against the City of Dresden alone.

Defendant's Exhibit 125

Although my entire endeavor is directed solely toward preserving the estate, i.e. toward preventing the estate, of which in my opinion 95 per cent. should go to my father, being diminished by unnecessary litigation, the expense of which, regardless of whether he wins or loses, will have to be borne by him, either directly or indirectly.

Now I am of the opinion that the City of Dresden should likewise take the same view as to the utmost protection of the estate, and that it should likewise have the greatest interest in avoiding litigation which will have the one certain result that the attorneys involved and the receiver will earn fees.

With special reference to the action of avoidance you, too, must have been struck by the endeavour to obtain as high an amount as possible, despite the fact that so far there has not appeared any convincing reason which in the interest of the estate would justify running the risk of high litigation costs. According to an estimate which I have had made, the costs of the action of avoidance will, if the amount demanded is as proposed, come to some 150,000 RM for the proceeding in the trial court alone, which means that the trial stage would already swallow more than the cash assets of the estate. Nevertheless the receiver in bankruptcy and his legal advisers have so far deliberately avoided discussing the well founded objections which were raised by the member of the creditors' committee and bank lawyer Herbeck, with the result that their highly personal treatment of purely legal questions has culminated in rude denunciations of Assessor Herbeck, who thereupon resigned from his office as member of the creditors' committee.

A further point which makes it appear necessary to bring the bankruptcy proceeding to a rapid termination is the

Defendant's Exhibit 125

highly deplorable situation in which some of the small creditors, in particular the tradesmen, find themselves. It is in my opinion indefensible from the social point of view not to satisfy the small creditors in preference to all others but instead to burden the estate with the risk of high costs of litigation and for that purpose to delay the distribution of the estate which is such a necessity for the small creditors.

If I were the sole large creditor I would long ago have submitted a proposal for settlement which would have granted preferential satisfaction to the small creditors.

This, however, has been made impossible by the surprising appearance of the City of Dresden as a creditor, for without the consent of the City of Dresden we cannot grant preferential treatment to the small creditors.

In this connection I have no desire to conceal from you that the sudden filing of the claim by the City of Dresden, after bankruptcy proceedings were commenced, made a very peculiar impression on my father and myself. For if the City of Dresden had, as is customary in business, taken the appropriate steps against Deku or the Union Bank as soon as the damage it alleges had occurred, Deku's frauds would not have been committed and thus my father would have been spared a great financial loss and what is more, an acute personal disappointment. You will admit that in the interest of economic stability a conduct cannot be approved by which some one holds back claims in the amount filed by you, which exceed many times the capital stock of the debtor company, in the expectation that the debtor, through transactions with bona fide third parties, may obtain assets out of which the creditor then proposes to satisfy himself. Had my father known that the City of

Defendant's Exhibit 125

Dresden asserted such extensive claims against the Union Bank he would naturally not have transacted any business with the Union Bank; in any event, however, he would have secured himself in such a manner that he could not have incurred any losses. This is likewise true of all other creditors interested in the bankruptcy proceedings. The conduct of the City of Dresden, according to the view of the lawyers whom I have consulted, cannot be reconciled with the principles of business ethics. For this reason my experts are of the opinion that we can successfully fight the claims of the City of Dresden on this ground alone, as it would violate good faith if the City of Dresden were to be satisfied out of an estate which it has idly watched growing at the expense of other creditors, thus violating good faith and business ethics. The question whether in addition there exists a claim for damages on account of this conduct, is presently under investigation.

Since I have neither the time nor the inclination to engage in a rat race of litigation which would keep courts and lawyers busy for years and since, moreover, I prefer to direct my efforts toward a more productive activity, I have considered whether it would not be possible, without prejudice to the legal position of either side, to reach an agreement with the City of Dresden. I therefore offer you the following proposal:

My father will take over the claim of the City of Dresden, against payment of 5% of the amount to which you acquire legal title, valid against all who have contested your claims; my father will pay a minimum of RM 10,000, but not more than RM 225,000. The minimum amount of RM 10,000 will be paid immediately upon conclusion of the sale. The assignment of the claim will not take place until the claim has been determined by final decree; it will be made simul-

Defendant's Exhibit 125

taneously with the payment of the remaining amount. After conclusion of the sale my father shall be authorized to represent the claim of the City of Dresden at the creditors' meeting in the bankruptcy proceedings, for which purpose you will give a power of attorney to my father or his agent.

Please let me have your comments on the foregoing proposal. I remain,

Hail Hitler!

Defendant's Exhibit 126

Budapest, April 1, 1937
Telephone: 1-249-43, 1-258-47

Dr. Salusinszky Gyula
Attorney
Budapest, V., Bathory-Utca 5.SZ

(handwritten:) April 8, 1937

Dear Mr. von Opel:

Re: Discount Bank—Credit Matter.

As I previously informed you, the Hungarian National Bank agreed to an extension of credit to August 12, 1937.

Since you, dear Mr. von Opel, have not yet come to Budapest so that we could discuss the pending questions, I assume as a certainty that you as well as the Schweizerische Bankverein, Zurich, are going to extend the guaranty until August 12, 1937.

For that reason, I beg you to get in touch in this matter with the Schweizerische Bankverein, Zurich, and to make arrangements for that bank to send its approval of the extension of the credit to the Discount Bank as soon as possible.

At the same time, I request you to sign and return to me at your earliest convenience the usual statement, draft of which is attached.

x x
x

Defendant's Exhibit 126

I learned from Mr. S. V. Krausz that you intend to come here in the near future and I hope that we have a chance to meet with you here very soon.

With kind regards
sincerely yours,

/s/ Dr. Salusinszky

Special delivery
Enclosure.
(handwritten) DT

Defendant's Exhibit 127

Budapest, August 18, 1939
Telephone: 1-249-43, 1-258-47

Dr. Salusinszky Gyula
Attorney
Budapest, V., Bathory-Utca 5.SZ.

Mr. Fritz von Opel, Engineer,
Hotel Dolder
Zurich.

I.

Dear Mr. von Opel:

Re: Powers of Attorney.

With reference to your telephone conversation with engineer von Krausz, concerning the above matter, I wish to ask you for the following:

Some time ago—on May 4, 1936—you, dear Mr. von Opel, gave two powers of attorney to Dr. Salusinszky, so that he could represent you in dealings with individuals as well as public authorities and sign in your name for the firm of Transdanubia Bauxit.

The deplorable change which has occurred in the meantime has made it necessary to transfer that power of attorney to me as the head of the Salusinszky Office; for that purpose I enclose the texts prepared at that time by the late Dr. Salusinszky with the request to sign them and return them to me.

Early attention to my request would be greatly appreciated, since it might become necessary in a short time to make dispositions in your name, that is, to sign your name,

Defendant's Exhibit 127

which, of course, cannot be done without a proper power of attorney.

Thanking you in advance for your kind reply, I remain,

Sincerely yours,

/s/ D. Timar

Enclosure.

P. S. In the matters Fayer and Koranyi I also need new powers of attorney; therefore I enclose 4 forms of powers of attorney with the request to sign these too and return them to me. The places for the signatures have been marked by me with pencil.

Defendant's Exhibit 128

Budapest, Sept. 4, 1939
Tel. 1-249-43, 1-258-47

Dr. Salusinszky Gyula
Attorney
Budapest, V., Bathory-Utca 5 SZ

Engineer Fritz von Opel
Hotel Dolder
Zürich

I.

Dear Mr. von Opel:

I have been waiting for your reply to my reports for a very long time. I believe that this delay must be attributed mostly to the events which have occurred in the meantime, and it is doubtful whether these present lines will reach you. At any rate, I shall write and tell you at least in broad outline what has happened in the meantime.

Engineer von Krausz has joined the armed forces, likewise our agent in Sümeg, Mr. Kiss, so that at present I alone—that is together with Mr. Palócz, who works in the office—have charge and take care of things.

The Royal Hungarian Mining Board gave us a deadline until September 10, by that time we have to report the result of the agreement to be made with Giulini, or the result of our plans for the further operation of the mines, or, in case this should not be possible, we have to name a joint representative. In view of the extraordinary situation, I applied for an extension of this deadline, at least until the end of the month, and I hope that I shall be able to get this brief postponement, although the Mining Board takes the position that just in view of these war times, there

Defendant's Exhibit 128

must be no halt in the bauxite production.—Nevertheless, I hope that the deadline will be extended, so that there will be some time left to take care of the various pending questions.—

In the meantime, the workers filed a suit in court against the mine owners for the wages which Koranyi did not pay. —The first hearing in this matter will take place on the 13th inst., before the District Court of Tapolcza.

At any rate, I should appreciate it very much if you, dear Mr. von Opel, would inform me as soon as possible of the result of your negotiations with Giulini and would also inform me about your further plans. I believe that in view of the war, an even greater increase in the demand for bauxite can be expected, and that it would be a pity not to continue operations now. Accordingly, we must positively find some sort of solution for continuing operations, because only in that way can we hope to get a return for you on the money already invested, and to obtain even a considerable profit within a short time.

On this occasion I would not fail, dear Mr. von Opel, to direct your attention to the fact that during the last few days a new regulation was issued here, according to which the importation of Pengö bank notes from foreign countries to Hungary is permitted only under a license of the Hungarian National Bank.—Therefore, if someone receives a package of such bank notes, he is obligated to open it at the National Bank and to apply for the latter's permission for the use of the Pengö. This procedure is rather long and complicated, and in case you intend to send additional amounts here, I should consider it better—in view of the present difficult situation alone—to remit the amount con-

Defendant's Exhibit 128

cerned through a bank, in which case the permission of the National Bank is not necessary.

x x x

I should like to urge you, dear Mr. von Opel, to let me have as soon as possible your reply to my letters written some time ago, as well as to the present lines, otherwise I shall be in the dark regarding your further plans and the measures to be taken. I also urgently need the powers-of-attorney which I sent to you, and am looking forward to your reply in this respect also.

Hoping to hear from you, I remain

Yours very truly,

/s/ D. Timar

Defendant's Exhibit 129

Budapest, September 21, 1939
Telephone: 1-249-43, 1-258-47

Dr. Salusinszky Gyula
Attorney
Budapest, V., Bathory-Utca 5.SZ

Mr. Fritz von Opel, Engineer
Hotel Dolder
Zurich

I.

Dear Mr. von Opel:

Re: Transdanubia Bauxite A.G.

Yesterday I received your letter of September 11. Therefore your letter crossed my letter of September 18 in the mail.

I greatly appreciate your information and the powers of attorney which you placed at my disposal.

At the present Oberbergrat Somogyi is in the country, however, he will be back in a few days, whereupon I shall get in touch with him immediately. I am convinced that the Mining Board would much prefer his election as joint representative to that of Dr. Suekoesd proposed by Giulini. As soon as the application for registration of the joint representative has been made, we shall immediately request that the Royal Mining Board approve the shutdown of the mines or rather of their operation; thus we could wait, without prejudice to the mining rights, until you, dear Mr. von Opel, find the reopening of the operation feasible and opportune.

Defendant's Exhibit 129

It is a matter of course that, before making the agreement with Oberbergrat Somogyi about his fees, I shall inform you about it in order to obtain your consent.

With kindest regards
Sincerely,

/s/ D. Timar

Defendant's Exhibit 130 for Identification

Collet & Engelhard

Machine Tool Factory Incorporated, Offenbach on the Main.

[stamp:] Amtsgericht,
Offenbach on the Main.
Received: April 9, 1935.
[initials]

April 8, 1935.

The Amtsgericht [County Court]
Offenbach on the Main.

Subject: HRB 91.

Our reference: AS/RM

In immediate reply to your letter of April 1, 1935, which did not reach us until today, we herewith inform you, to supplement the recent oral report by the undersigned whose signature appears on the left, that the negotiations for a transfer of our capital stock into other hands are being conducted with great energy. Mr. Keppler, the economic adviser of the Fuehrer, is conducting these negotiations in person.

It is at present still uncertain when the stockholders meeting can be held, since it is intended not to hold it until all questions have been settled, in order to avoid new difficulties.

We would like to request a further extension of time for the calling of the stockholders meeting. We had advised Mr. Keppler earlier, when he inquired on the subject, that the local Amtsgericht was very cooperative on this point.

Defendant's Exhibit 130 for Identification

The undersigned whose signature appears on the left is always at the disposal of Amtsgerichtsrat Hager for further information.

Hail Hitler!
Collet & Engelhard
Machine Tool Factory Incorporated
(s) [two illegible signatures]

Defendant's Exhibit 131 for Identification

Collet & Engelhard

Machine Tool Factory Incorporated, Offenbach on the Main.

[stamp:] Amtsgericht, Offenbach on the Main.
Received: June 20, 1935.
[initials]

June 19, 1935.

Amtsgericht [County Court],
Offenbach on the Main.

Subject: HRB 91. Our reference: AS/Rm.

To supplement our letter of June 4th, we beg to inform you that the regular stockholders meeting of our company called for June 25th had to be postponed again, this time to

Monday, July 22, 1935, 11 A. M.

The postponement has become necessary, inasmuch as yesterday, with the cooperation of Mr. Keppler, economic adviser to the Fuehrer, the sale of our majority stock was definitely consummated.

However, the necessary formalities (payment, transfer of the capital stock, appointment of the Board of Directors) cannot be carried out in the short time available, and so today we set the new date mentioned above. A further delay is out of the question since the matter has now been definitively settled.

Hail Hitler!
Collet & Engelhard
Machine Tool Factory Incorporated
(s) [two illegible signatures]

Defendant's Exhibit 132

St. Moritz, March 26, 1936

Miss Frentzel
c/o Secretariat Geh. Rat W. von Opel
Ruesselsheim on the Main

Dear Miss Frentzel:

As you have seen from newspaper reports, the time for the Hapag-Lloyd Stockholders Meetings has come at last: the dates have been set for April 23 and 24 respectively. Thus the day is approaching when Mr. Deku's promises are supposed to come true, for which reason I am of the opinion that he will entrench himself behind the statement that both stockholder meetings are "special" and that the socalled "regular" stockholders meetings will not take place before June 16 and 17 respectively.

In this connection the documents which we have mentioned in the attached list will be important and especially document No. 4. I ask you, therefore, to answer the following questions:

1) Was the locking-up of the list carried out properly?

2) Where and how were the documents locked up? Was it done in such manner that both Mr. Deku and you have identical keys and you, therefore, have separate access to the safe, or are things arranged in such a way, as would be correct, that Mr. Deku and you have different keys, so that the safe can be opened only by you jointly?

3) If you made copies of the originals before putting them under lock and key, I should appreciate getting copies of letters No. 4 and 5.

Defendant's Exhibit 132

As you see, I am still filled with the deepest suspicion, and therefore, during the visit of my father, I should like to talk over the steps we want to take if the matter finally fails. For this purpose, I need the above-mentioned information.

Since I do not yet have the requested statement "cash receipts and disbursements" (I hope that my father will bring it along), and details can probably not be seen from that statement, I should be grateful to you if you would let me know the following:

1) At what average price did we invest in the entire share holdings?
   Or how many shares were bought at what amounts?

2) How is our legal situation toward the Union Bank?
   - a) were half of our holdings already definitely sold to the Union Bank at the rate of about 40, or
   - b) did the Union Bank give us only an advance payment of a corresponding amount?

This question is important for the reason that in case A we would merely have to bear half the loss, while in case B the entire loss would be ours. In case A we would, of course, also suffer indirectly, because the Union Bank would not survive such a loss, and in view of our unfortunately very unclear position vis-a-vis this institution, we would possibly suffer losses in a manner not yet discernible.

In order to save my father unnecessary excitement, it will probably be better if he learns of this letter only after the legal situation has been clarified on the basis of the re-

Defendant's Exhibit 132

quested documents. At any rate, at the moment no measures are necessary nor possible.

I remain with best regards
Yours

P.S. The copies of the letters from and to Mr. Kepler, which were to be enclosed in your last letter, have not yet been received.

Defendant's Exhibit 133 in Evidence

COUNTY COURT SECT. 5
Offenbach on the Main
TITLE AND LOCATION OF THE COURT

No. 5 HRB 576

Collet & Engelhard Maschinenfabrik A.G.
TITLE OF THE CASE

I, Justizinspekter [title] Neutzner, as Document Officer of the County Court Sect. 5 at Offenbach on the Main, Germany, do hereby certify the foregoing document to be a true and correct photostatic copy of the original which is part of the files of this Court and in my custody in the above entitled case.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court,
this 12th day of November 1953

Name sgd Neutzner
as Document Officer of
the Business Office of the
County Court Sect. 5
at Offenbach on the Main

Seal of the
County Court
Offenbach on the Main

Defendant's Exhibit 133 in Evidence

Copy

RM 100.00 stamp tax
in cancelled stamps
Berlin, July 31, 1940.

Dr. Weiskam
Notary.

No. 326 of the Notarial Register for 1940.

Berlin, July 29, 1940.

The undersigned notary, Dr. Godehard Weiskam, residing at 21 Luther Strasse, Berlin W 62, proceeded today, at the request of the managing board of the firm of Collet & Engelhard Machine Tool Factory Incorporated, Offenbach on the Main, to the premises of the Head Office of the Dresdner Bank, 35/39 Behrenstrasse, Berlin W 56, for the purpose of notarizing the minutes of the 28th regular stockholders meeting of the aforementioned firm.

At the said offices he found the following persons present;

I. of the Board of Directors of the said firm:
Attorney at Law Dr. D. Gros, Berlin, chairman,

II. of the Managing Board of the said firm:
Director Hermann Abbetmeyer of Offenbach on the Main,

III. the shareholders and shareholders' representatives specified in the list of persons present.

The chairman of the Board of Directors, Attorney at Law Dr. D. Gros, opened the general meeting at 1.10 p.m. and took the chair. He stated that the invitation for today's 28th stockholders meeting had been issued by publication

Defendant's Exhibit 133 in Evidence

in the first supplement to the German Reich and State Gazette, No. 154, of July 4, 1940, page 4. The said gazette, which was available at the meeting, contains the following announcement:

> "Collet & Engelhard Machine Tool Factory Incorporated, Offenbach on the Main.
>
> Pursuant to §§ 20 and 21 of the articles of incorporation of our company, we hereby invite our shareholders to attend the 28th regular stockholders meeting which will take place on Monday, July 29, 1940, at 11 a.m., on the premises of the Head Office of the Dresdner Bank, 35/39 Behrenstrasse, Berlin W 56.

Agenda:

1. Submission of the balance sheet and the profit and loss account for the 1939 business year.
2. Consideration of a resolution concerning the use of the net profit.
3. Consideration of a resolution concerning the discharge of the Managing Board and the Board of Directors.
4. Election to the Board of Directors.
5. Amendment of § 19 of the articles of incorporation.
6. Election of the auditor for the new business year.

Those shareholders who wish to exercise their voting rights at the stockholders meeting must deposit their shares, at least 3 week days before the general meeting,

> at Offenbach on the Main with the company Cashier's Office, with the Commerzbank Aktiengesellschaft, Offenbach on the Main branch,

with the Deutsche Bank, Offenbach on the Main branch,
with the Dresdner Bank, Offenbach on the Main branch,
at Frankfort on the Main with the Deutsche Bank, Frankfort on the Main branch,
with the Dresdner Bank, Frankfort on the Main,
with the Frankfurter Bank,
with Grunelius & Co.,
in Berlin with the Dresdner Bank,

or bring proof that they have deposited their shares with a notary.

Offenbach on the Main, June 29, 1940.
The Managing Board."

The chairman displayed for inspection the list of shareholders present and represented and stated that the shareholders' representatives were duly identified. The list is attached to this document as appendix 1.

The meeting then proceeded to the agenda.

Re item 1 of the Agenda:
Submission of the Balance Sheet and the Profit and Loss Account for the 1939 Business Year.

Printed copies were available of the annual balance sheet and the business report, together with the report of the Board of Directors, which have been on display at the company's offices since June 29, 1939.
[in handwriting:] ? 1940!

A copy of the printed pamphlet containing the annual balance sheet and the business report and the report of the Board of Directors is attached to these minutes as appendix 2. The meeting took cognizance of the submission and thereby of the annual balance sheet and the profit and loss account (annual closing of accounts).

Defendant's Exhibit 133 in Evidence

Re item 2 of the Agenda:
Consideration of a Resolution concerning the Use of the Net Profit (Distribution of Profit)

It was resolved that the net profit be distributed in accordance with the proposal of the Managing Board and the report of the Board of Directors in that, of the net profit

(distribution of profit) of	RM 237,984.59
a dividend of 10% in the amount of	RM 194,400.00
be distributed, and	RM 43,584.59

be carried forward to the new account.

Re item 3 of the Agenda:
Consideration of a Resolution concerning the Discharge of the Managing Board and the Board of Directors.

It was resolved that the Managing Board and Board of Directors which held office during the 1939 business year, from January 1, 1939 to December 31, 1939, be discharged of all liabilities for that period. In each case, the gentlemen for whom discharge was sought did not participate in the passing of the resolution. A separate vote was taken for the Managing Board and the Board of Directors.

Re item 4 of the Agenda:
Election to the Board of Directors

Under the articles of incorporation, one-fourth of the members of the Board of Directors must retire from office. Attorney at Law Dr. Gros was chosen by lot as the member to be retired, but was immediately re-elected by the Stockholders meeting.

Defendant's Exhibit 133 in Evidence

Re item 5 of the Agenda: Amendment of § 19 of the Company's Articles of Incorporation.

It was resolved: The last paragraph of § 19 of the Articles of Incorporation shall henceforth read as follows:

"In addition to their cash expenses, the members of the Board of Directors shall receive, in compliance with the provisions of § 98, paragraph 3, of the Stock Corporation Law, a share in the annual profit totalling 10% of the net profit, which share shall be so distributed among the members that the chairman shall receive 2 and the remaining members 1 per capita share. In any case, however, at least RM 3,000.00 shall be paid to the chairman and RM 1,500.00 to each member, one-half thereof to be paid on both June 30 and December 31 of each year.

At the same time, Dr. Gros made known the interpretation given by the Managing Board to the former version of the last paragraph of § 19 of the articles of incorporation. The stockholders meeting approved the said interpretation after discussion, which approval without dissension was announced by the chairman.

Re item 6 of the Agenda: Election of the Auditor for the New Business Year.

The meeting resolved to have the business activities of the enterprise for the 1940 business year examined by the

Deutsche Treuhand-Gesellschaft
44/45 Taubenstrasse, Berlin W 8.

All resolutions were passed unanimously by acclamation and announced by the chairman.

The chairman thereupon closed the meeting.

Dr. Weiskam, Notary.

Defendant's Exhibit 133 in Evidence

Appendix 1 to Document Roll 326/40

Berlin, July 29, 1940.

Dr. Weiskam
Notary

List of Shareholders (List of persons present) at the 28th regular stockholders meeting of the Collet & Engelhard Machine Tool Factory, Incorporated, Offenbach on the Main, on Monday, July 29, 1940, at 11 a.m., on the premises of the Head Office of the Dresdner Bank, 35/39 Behrenstrasse, Berlin W 56.

		Common Shares		
Shareholder	Representative	Own	For Third Parties	Votes
Wilhelm von Opel, Geh. Kommerzienrat, Hon. Dr. of Eng., Ruesselsheim on the Main	Attorney at Law Dr. D. Gros, Berlin	1,171,500.00		11715
Frankfurter Bank, Frankfort on the Main	Dr. D. Gros		62,200.00	622
Grunelius & Co., Frankfort on the Main	Mr. Abbetmeyer Frankfort on the Main	25,600.00	3,000.00	286
Dresdner Bank, Frankfort on the Main	Mr. Uhrlandt, Berlin		10,100.00	101
Dresdner Bank, Berlin	Mr. Uhrlandt, Berlin		3,000.00	30
		1,197,100.00	78,300.00	
			RM 1,275,400.00	12754

Defendant's Exhibit 133 in Evidence

Appendix 2 to Document Roll
326/40

Berlin, July 29, 1940.

Dr. Weiskam
Notary.

COLLET & ENGELHARD

Machine Tool Factory Incorporated

Offenbach on the Main

REPORT

on the 28th Business Year

from January 1, 1939, to December 31, 1939.

Defendant's Exhibit 133 in Evidence

COLLET & ENGELHARD

Machine Tool Factory Incorporated
Offenbach on the Main
[trade mark:] C & E.

REPORT

on the 28th Business Year
from January 1, 1939, to December 31, 1939.

Agenda

of the 28th regular stockholders Meeting
scheduled for
Monday, July 29, 1940, at 11 a.m.,
on the premises of the Head Office of the Dresdner Bank,
35/39 Behrenstrasse, Berlin W 56.

1. Submission of the balance sheet and profit and loss account for the 1939 business year.
2. Consideration of a resolution concerning the use of the net profit.
3. Consideration of a resolution concerning the discharge of the Managing Board and the Board of Directors.
4. Election to the Board of Directors.
5. Amendment of § 19 of the articles of incorporation.
6. Election of the auditor for the new business year.

Defendant's Exhibit 133 in Evidence

Board of Directors:

Attorney at Law Dr. Daniel Gros, Berlin, Chairman

Geh. Kommerzienrat Jakob Klein, Hon. Dr. of Eng., Frankenthal, Palatinate

Fritz von Opel, certified engineer, St. Moritz

Justizrat Dr. Ferdinand Pachten, Frankfort on the Main

Managing Board:

Erich Vogel Hermann Abbetmeyer

Report of the Managing Board

a) Business Report

The urgent demand for our high-grade products continued undiminished in the 1939 business year. Despite full exploitation of the capacity of our workshops, we were unable to meet the demands made on us for delivery of the machines which we construct, so that the amount of unfilled orders has again increased as compared with last year. The export trade continued at the same level as in the previous year; business with the USSR, which we have always specially cultivated, has increased remarkably.

Our principle of adapting the machines built by us to the ever-increasing demands by continuous development has proved its efficacy. This fact was mentioned on a number of occasions by the technical and daily press.

We are devoting ourselves with the greatest of care to the training of skilled workers and the retraining of workers who have no experience in this field. In the interests of advanced training, a number of the members of our staff constantly participate in the technical courses instituted by the German Labor Front.

Defendant's Exhibit 133 in Evidence

Regarding the current balance sheet, we wish to state:

Fixed Assets: This year also we have written off newly acquired machines and tools in their entirety. The real estate at 21 Strahlenbergerstrasse has been sold.

Participations: We have valued the shares of the Machine Factory Wiesbaden Incorporated, Wiesbaden, which are all in our possession, at 75% of their par value, in view of the fact that the company has so far paid no dividends and of the uncertain prospects for the future.

Stocks: The amount of the stocks is in accordance with the volume of our business. As usual, the stocks themselves have been conservatively estimated.

Securities: The securities consist principally of Reich Loans and tax anticipation certificates.

Reserves: The non-statutory reserves shown in the business report for 1938 have been consolidated into one amount, and to this amount a further sum of RM 130,000.00 has been added.

Accounts Receivable and Liabilities: These items likewise correspond to the volume of business. In evaluating the accounts receivable, all risks have been taken into consideration. Advances paid by customers have increased in proportion to the increased amount of unfilled orders.

Contingent Liabilities: Excluding Russian and similar notes, the liabilities deriving from negotiated notes amounted on the balance sheet closing date to RM 326,172.85. The usual security has been furnished for advance payments by public authorities.

The payments made to the Managing Board amounted to RM 83,200, and those to the Board of Directors to RM 12,479.58.

Defendant's Exhibit 133 in Evidence

Of the net profit of	RM	367,984.59
after deduction of the reserves of	“	130,000.00
there remains	RM	237,984.59
We propose that therefrom a 10% dividend=	“	194,400.00
be distributed, and the remainder of	RM	43,584.59
be carried forward to the new account.		

Our workshops were again fully employed in the current business year.

In compliance with the Ordinance of the Ministerial Council for the Defense of the Reich of September 4, 1939, we refrained from having the closing of accounts examined by the balance sheet auditor.

b) Social Report.

This year, as heretofore, we again devoted particular attention to the welfare of our staff members by granting maintenance allowances in the case of long illnesses, recuperative leave, family affairs, etc.

The maintenance of the health of our staff was promoted, as in the past, by the care of the plant physician.

Our retired colleagues receive monthly payments in accordance with their length of service.

Further interest-free loans were made available for homes owned by our staff.

After being employed by the firm for one year, all members of the staff receive a special supplementary payment, when going on leave, from a community fund based on the principal of parity.

Defendant's Exhibit 133 in Evidence

Our plant sports association, which has its own sports field, has been further expanded and participation in it is lively.

In the year under review we disbursed approximately RM 201,000.00 in voluntary social contributions. This amount includes an annual bonus for our staff, in the amount of RM 78,500.00, which was paid out at Christmas.

We further supported the advanced training of specially talented staff members and those colleagues who were winners in the Reich Vocational Competition. By assuming the costs, we made it possible for them to attend a technical school.

In the year under review, one colleague completed 40 years and 4 colleagues 25 years service in the firm. Our colleague Hugo Stein was specially honored in that he was awarded by the Fuehrer and Reich Chancellor the Honor Cross for faithful service in the free economy for 50 years service in the plant.

The Gauleiter again gave us the distinction of awarding us the Regional Diploma for Excellent Achievements.

We wish to express our thanks to the members of our staff for their diligent cooperation during the past business year for the good collaboration with the plant management which has always been shown. Since the outbreak of war many of our colleagues have been called to the colors. The bonds between our soldiers and our plant community will continue to be maintained through our plant newspaper and continuous correspondence.

Offenbach on the Main, June, 1940.

The Managing Board.

Defendant's Exhibit 133 in Evidence

Report of the Board of Directors

After examination, the Board of Directors approves in all respects the annual balance for the aforementioned business year submitted by the Managing Board and the proposal for distribution of the profit.

The Board of Directors has kept itself continuously informed through reports from the Managing Board and by examinations of the business situation and the business management.

Offenbach on the Main, June, 1940.

The Board of Directors."

Defendant's Exhibit 133 in Evidence

Balance Sheet as of December 31, 1939.

ASSETS	State as of January 1, 1939. RM	Increase RM	Decrease RM	Write-offs RM	State as of December 31, 1939. RM
Fixed assets:					
Developed real estate:	41,047.00	—	—	1,130.00	39,917.00
a) Dwellings	↓			↓	↓
b) Factory buildings	1,087,169.00	39,099.84	65,000.00	49,373.84	1,011,895.00
Undeveloped real estate	70,385.00	—	—	—	70,385.00
Machines and equipment	3.00	142,991.24	—	142,991.24	3.00
Tools, furniture and fixtures	3.00	153,611.50	—	153,611.50	3.00
Patents	1.00	—	—	—	1.00
	1,198,608.00	335,702.58	65,000.00	347,106.58	1,122,204.00
Participation				726,050.00	
—write-off				182,300.00	543,750.00
Working Capital:					
Raw, auxiliary and operating materials				293,103.66	
Semi-finished products				2,066,298.38	2,359,402.04

Defendant's Exhibit 133 in Evidence

Balance Sheet as of December 31, 1939.

ASSETS	State as of January 1, 1939. RM	Increase RM	Decrease RM	Write-offs RM	State as of December 31, 1939. RM
Securities					668,923.31
Advance payments					90,600.00
Trade accounts receivable					1,975,350.51
Cash, Reichsbank and postal check credit balances					3,685.19
Bank credit balances					85,795.65
Other accounts receivable					40,594.52
Deferred items					126,754.78
Guarantees			50,000.00		
					7,017,060.00

Defendant's Exhibit 133 in Evidence

LIABILITIES			RM
Capital Stock			1,944,000.00
Reserves:			
Statutory reserves			194,400.00
Other reserves			725,308.66
Contingent Reserves			378,235.47
Liabilities:			
Advance payments by customers		2,358,785.21	
Trade accounts payable		755,288.13	
Accounts payable to banks		214,920.00	
Other accounts payable		208,137.94	3,537,131.28
Profits:			
Profit carried forward		50,928.75	
Annual profits		187,055.84	237,984.59
Guarantees	50,000.00		
			7,017,060.00

Defendant's Exhibit 133 in Evidence

Profit and Loss Account, 1939.

Expenditure		RM	Income	RM
Wages and Salaries		2,660,928.61	Profit carried forward	50,928.75
Social contributions		181,375.72	Annual income pursuant to §132 of the Stock Law	4,558,343.35
Write-offs on plants		347,106.58	Interest	19,683.88
Other write-offs		182,300.00	Extraordinary income	53,211.60
Transferred to other reserves		130,000.00		
Taxes:				
Property taxes	772,571.95			
Other taxes	150,013.41	922,585.36		
Contributions to trade associations		19,886.72		
Profit:				
Profit carried forward	50,928.75			
Annual profits	187,055.84	237,984.59		
		4,682,167.58		4,682,167.58

Defendant's Exhibit 134

St. Moritz, January 29, 1937
House Kulm

Mr. Schüz, Dr. Eng.
c/o Machine Tool Factory Collet & Engelhard Inc.
Offenbach on the Main.

Dear Dr. Schüz:

It gives me pleasure and satisfaction to inform you that, in compliance with my proposal, the Board of Directors adopted unanimously a resolution to present you an amount of RM 1500.00 in recognition of your excellent scientific performance in the field of photo-electric control of milling machines. The chairman of the Board of Directors will send you the remittance within the next few days. I thought it desirable, however, to give you that information today.

I left it to the Managing Board to announce on the bulletin board, with your agreement, the honor conferred upon you.

Hoping that I may count on your future cooperation for the good of the plant, I remain, with my best regards and

Heil Hitler,
Yours,

Copy to Dr. Gros, Berlin

Defendant's Exhibit 135

St. Moritz, February 2, 1937
House Kulm

Dr. Daniel Gros
Attorney
Berlin W 62.

Re: Collet & Engelhard/Hermann Abbetmeyer, engineer.

Dear Doctor:

Yesterday I interviewed Mr. Abbetmeyer whom I hired temporarily on probation until December 31, 1937 at a total salary of RM 1500.00 per month, effective February 15, 1937. Mr. Abbetmeyer shall have the same salary as Mr. Vogel, that is approximately RM. 1400.00; the balance shall be paid to him at the end of the year.

If the probationary period should turn out to our satisfaction, as I firmly believe, I intend to put Mr. Abbetmeyer, also as far as the bonus is concerned, on the same level with Mr. Vogel and this would apply also to the current year.

With reference to the assignment of work I do not wish to make definite arrangements before Mr. Abbetmeyer has obtained an overall picture of the entire field of operations. However, it may be determined now that Mr. Vogel shall confine himself to all activities which are connected with the production and that he therefore shall not spend a large part of his working hours outside the plant and that Dr. Pfender under the supervision of Mr. Abbetmeyer shall be confined to indoor work. The real representative of the plant towards the customers will therefore be Mr. Abbet-

Defendant's Exhibit 135

meyer; if the opportunity should arise, we could appoint him manager later on.

In appreciation of the letter to Attorney Grasshoff which you were kind enough to draft for me, I take the liberty to enclose drafts of the letters to the gentlemen in Offenbach and to Mr. Abbetmeyer.

With kind regards,
Yours,

Enclosures.

Defendant's Exhibit 136

St. Moritz, February 3, 1937
House Kulm

Geheimrat Dr. Wilhelm von Opel
at present Feldberg (Black Forest)
Hotel Feldberger Hof.

(handwritten:) C & E

Dear Father:

Enclosed you will find copies of my letters of today to Mr. Abbetmeyer, Mr. Vogel and Dr. Pfender. I hope that, by reason of these, as I hope, diplomatic letters, the two gentlemen will not be upset too much by Mr. Abbetmeyer's entry into the firm.

Enclosed you will find also a copy of my reply to Dr. Gros in the lawsuit Aschaffenburg. In order to save costs we filed for the time being a suit in the amount of only RM 10,000.00. Please do not put this matter on your notorious list because it cannot be rushed. I will continue to attend to it. Enclosed also is a copy of my letter to Birkenfeld.

Since your departure we have had here thaw and dirty weather. I suppose you have a real flood on the Feldberg.

With my kindest regards,
Yours

5 Enclosures

Defendant's Exhibit 137

St. Moritz, April 12, 1937
House Kulm

Mr. Friedrich Volk
c/o Schlegel & Volk
Frankfort on the Main.
Hohenzollernplatz 2.

Dear Mr. Volk:

Please forgive me if I did not reply earlier to your detailed letter of February 5, 1937 with enclosures, but during the last months I had to devote my attention solely to the Deku matter and all problems connected with it and only now I again have time for productive work after that scoundrel was sent to the penitentiary for 3½ years.

Managing Board of Collet & Engelhard:

I thank you very much for your endeavors in this matter which have come to a good end inasmuch as in January, 1937 Mr. Abbetmeyer, an engineer who formerly worked in Ruesselsheim, contacted my father and me, whereupon I hired this man who is extraordinarily qualified for the purposes of Collet & Engelhard. You know best that it is not good to have a pure businessman in a machine tool factory and on the other hand it would not have made sense to hire a man of the manager type as an additional member of the Managing Board.

Concerning Dr. Herbert Moehle whom you proposed, I am considering him for the Machine Factory Wiesbaden as a possible successor to Mr. Staben, who, as soon as the right man has been found, will leave the M.W. after a certain transition period and after the reorganization has been completed.

Your offer to the Machine Factory Wiesbaden:

When I was recently in Wiesbaden I again discussed your offer in detail. Since Hiltmann & Lorenz refused a fully automatic machine, working from a broad band, for reasons which I partly approve, because the M.W. has no specially trained staff of associates, I discussed your recent offer which, however, in comparison to the present although antediluvian method does not reduce costs sufficiently to justify a rather considerable investment and the necessity of complicated machine tools. It appears to me that the M.W. gets off cheapest if it acquires a press (possibly used) and continues to work according to the present method which still may be improved.

As you know, I always favor, regardless of cost, the purchase of machines of highest efficiency. This, of course, applies only to operations on a large scale where all prerequisites for the utilization and maintenance of such machines are fulfilled. This does not seem to be the case in Wiesbaden so that I like to resort to an intermediate solution for the time being.

Hydraulic Drive.

I thank you very much for the material you sent me, especially also for the data from Forst and Schuette. I am going to study further the problems mentioned and hope to be able to discuss them with you in May of this year in Frankfort.

May I call your attention at this time to your letter-heads on which I noticed the words "3 minutes from the main rail-

Defendant's Exhibit 137

road station". Your enterprise is so well known that, in my opinion, that notation is not necessary, in particular since anyone who seriously wishes to do business with you would not mind traveling a longer distance. Thank goodness you do not have to depend on sidewalk trade and for that reason I suggest you drop that notation which reminds me too much of excursion spots and coffee gardens eager to stimulate customers who are too lazy to walk and that, dear Mr. Volk, is as I hope, neither your intention nor do you need that. I thank you again and remain with

Kindest regards
as ever yours,

Defendant's Exhibit 138

Offenbach on the Main, March 23, 1937
Phone 81141

COLLET & ENGELHARD
Machine Tool Factory
Incorporated

Management

Mr. Fritz von Opel
Certified Engineer
At present St. Moritz
House Kulm

Dear Mr. von Opel:

We beg to inform you that our certified public accountant, Mr. Reinold Specht of Dortmand has now finished his auditing of the balance sheet so that, after consultation with Dr. Gros, we set the date for the meeting of the Board of Directors to examine the balance sheet and for the regular stockholders' meeting for

April 21, 1937

For your information we enclose a copy of our letter of today to Dr. Gros with reference to this matter. Dr. Gros also informs us that, after a conference with you, the purchase of machines in the total amount of up to RM 250,000.00, as proposed by us, has been approved.

Specific information concerning the machines which shall be bought will be furnished in the meeting of the Board of Directors.

With German greetings

Collet & Engelhard
Machine Tool Factory
Incorporated

Enclosure

Defendant's Exhibit 138

March 23, 1937

Dr. D. Gros, Attorney
Chairman of the Board of Directors of
Collet & Engelhard, Machine Tool Factory, Incorporated
Offenbach on the Main,
Berlin W 62
Budapesterstrasse 33.

Dear Dr. Gros:

We acknowledge receipt of your letter of the 22nd inst. and took cognizance of the fact that, after a conference with Mr. Fritz von Opel, you approved the purchase of machines up to

RM 250,000.00

as proposed in our request of February 3, 1937.

At the same time, we beg to inform you that in the meantime our certified public accountant Reinold Specht, Dortmund, has examined the balance sheet of our interim business year from July 1, 1936 to December 31, 1936 and has found it correct. You will receive the audit report by the end of next week, that is not later than April 3, 1937.

In addition we confirm our telephone conversation of today according to which the date for the meeting of the Board of Directors for the examination of the balance sheet and for the regular stockholders' meeting was set for

Wednesday, April 21, 11 A. M.

We assume the meeting of the Board of Directors for the examination of the balance sheet could therefore begin

Defendant's Exhibit 138

between 9 and 10 A. M. so that we can finish in time before the stockholders' meeting begins. In compliance with the by-laws we sent today the invitation for the stockholders' meeting to the Deutsche Reichsanzeiger for publication.

With German greetings,

Collet & Engelhard
Machine Tool Factory Incorporated
signed Dr. Pfender signed Abbetmeyer

Defendant's Exhibit 139

St. Moritz, February 28, 1938
House Kulm

Dr. D. Gros
Berlin W 62
Budapesterstrasse 33.

Re: Collet & Engelhard/Dr. Pfender

Dear Mr. Gros:

A few days ago I received a letter from Dr. Pfender that he wished to talk to me in a personal matter, and since I had some business in Zurich anyhow I told him to come there.

Dr. Pfender there informed me that he had received from the Berliner Handels-Gesellschaft a very favorable offer, viz., to become business manager of Meyer & Schmidt in Offenbach.

I congratulated him right away on this success which should give him great satisfaction, and told him that C. & E. would not stand in his way and that if he wished to resign, I would not blame him at all for taking advantage of such a chance which, as I had repeatedly told him, he did not have with C. & E. at the present time.

Whether or not Dr. Pfender meant this entirely seriously may be left undecided. However that may be, I had the impression that he regrets very much leaving C. & E. and that my cordial congratulations on our allegedly accomplished event surprised him a little.

The resignation of Dr. Pfender is, as I assume, the result of natural development, for it would be absurd for C. & E. to employ 3 managers even if the enterprise could

Defendant's Exhibit 139

at the present absorb such an additional expense. I would never have thought of dismissing Dr. Pfender; however, his continuous dissatisfaction with his salary and bonus was a source of permanent trouble, so that it may now be hoped that Mr. Vogel will change his attitude, too.

Dr. Pfender will call on you in the near future in order to discuss all the details with you.

He wishes to leave on May 1, of this year, after the Leipzig Fair and after completion of the work on the balance sheet; there will probably be no objection to this. I am of the opinion that we should give him a good reference and that before he leaves we should pay him not only the bonus for 1937 but also the bonus for 1938. In his well-known generous manner, Dr. Pfender counts on a total of RM 10,000.00, a sum which probably will not be reached for the total of 16 months. As far as I remember, we intended to give him RM 5000.00 for 1937 (the correspondence in question must be in your possession) so that the result would be a total amount of RM 6,666.00. I think we should round off that sum, possibly to RM 7500.00; however, I would prefer if, with a view to the other members of the Managing Board, another name could be found for the excess amount, for instance, the salary could be paid until the end of J and leave of absence could be given to him as of May 1.

Since Dr. Pfender gave notice and the other members of the Board of Directors were in agreement in any event, it may be sufficient to inform them of his resignation and to ask them whether they consent to the proposed remuneration.

With kind regards,

Yours,

Defendant's Exhibit 140

St. Moritz, April 22, 1938
House Kulm

Director Vogel
c/o Collet & Engelhard Inc.
Offenbach on the Main.

Dear Mr. Vogel:

As you know the Board of Directors authorized me to discuss with you the question of a further "Efficiency Program" for the plant.

You will also remember that some members of the Board of Directors made the suggestion to entrust outsiders with that task and that I opposed that suggestion very strongly. I know from my own activity which dealt almost exclusively with the increase of efficiency of our enterprise in Ruesselsheim what an extensive and ramified problem is hidden behind the short word "efficiency program" and that its solution extends not only to the plant but that it effects construction to a larger extent in automobile construction than in the fields of design, purchase, sale and even that of advertising.

I wish to say at the outset that "efficiency program" is by no means identical with a short-sighted wage and piece work policy; to the contrary, I always found that a efficient enterprise is in a better position to do justice to the demands for wage increases than is a badly organized enterprise where the wage portion per unit of turnover is of course higher.

Without discussing details, I wish to mention first of all the ideal of the "efficiency program" for Collet & Engelhard and the means of achieving it:

Defendant's Exhibit 140

1) *Education of customers to the end that they limit the number of types and also refrain from special orders:*

The first objection that you will hear from sales people to such action—the kind of product does not make any difference—is that sales will decrease and that the customers will go to competitors who comply with their special wishes. This statement is only partially true. Of course, I was never in favor of a policy of "Take it or leave it" but I was always of the opinion that the customer is the king; however, I was always successful in achieving a standardization of products or in reducing the number of types of products, no matter whether bicycles and automobiles in Germany are concerned, or gasoline, beer or oil, in my American enterprises. A standardization is in the well understood interest of the customer since it has favorable effects on the price, time of delivery, procurement of replacements, etc., and I have often found that the customer is less stubbornly opposed to simplifications than the salesman who wants to go at the same old jog trot and to take it easy.

The initiative for a standardization must always proceed from the leading brains of an enterprise and it must be executed more or less by dictatorial measures. Only little help may be expected from salesmen since their views are naturally more narrow-minded and they do not realize at the beginning the advantages which the entire enterprise will have from standardization. Of course, dictatorship does not mean a ruthless interference; the right way is to explain to the salesmen the desirable aim in reasonable terms, to use their advice as far as possible and perhaps, to make a partial trial which, e.g., may cover for the time being only one type of machine or one sector of the sales territory (as, for example, in the beer business). If, however, results have been achieved, then, of course, the dictatorship must proceed and one must have enough self-confidence so as not to listen to the crying of people affected but to carry out what we have learned to be right.

2) *Design Changes*:

If one has made sure which standardizations the customers can be "expected to take", three-fourths of the labor has already been done and the pleasant task remains to utilize constructively the new possibilities. It is not necessary for me to describe the hundredfold possibilities of more efficient design. It is sufficient to point out that the design must have the purpose:

a) to save weight of material, especially material to be paid for in foreign currency,

b) to produce by the most time-saving method by which method time is not only saved in productive and non-productive working hours but also through shortening the length of transportation (reduction of the circulating time).

I wish to mention an example for a) above:

> The use of molded parts of any kind instead of cast or forged parts, the use of standardized screws, the replacing of cast iron stands by welded stands, and so on.

It is clear that each design requires a minimum number of pieces in order to make production profitable; it must also have a maximum limit of production beyond which it can again be replaced by a method of production which is even better geared to mass production.

Defendant's Exhibit 140

It requires skillful calculation in advance and subtle intuition to find the correct solution in each case and as an example I wish to mention that it would make no sense to apply design methods of automobile construction to machine construction with its lower sales figures.

In case of doubt, however, I always prefer the next higher step of efficiency, not only because of the intense desire for technical perfection, which is characteristic of every engineer, but also because, under present principles of German national economy, higher investment costs are justified by a more efficient capacity of the plant.

Most of the foregoing applies also to b) above, the field of equipment design. It is a lamentable fact that in most plants all emphasis is placed upon, and all talent is, used for pure design whereas the equipment design is considered as a necessary evil.

In my opinion enterprise is soundest where special importance is attached to equipment design and where the most capable men of the enterprise are concerned with nothing else but the construction of efficient equipment and the planning of an uninterrupted flow of operations.

3) *Operational Measures*:

In the Third place are measures in the enterprise which are itself, of no less importance. If we start them without the preparations for 1) and 2) we will always get inadequate results. It is always a makeshift solution, though sometimes unavoidable, to have an efficiency program start from the enterprise itself. The field is so vast that I can only mention the broad outlines:

a) The first requirement is to have the largest possible part of the total working time spent on a product

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covered by piecework. *That plant is the soundest in which the largest portion of the total amount paid for wages withine one year has been spend on piecework.*

b) It is a wide spread superstition to assume that only "productive" (!) work can be done by piecework. The majority of machine toolmakers can be put on a piecework basis. In Ruesselsheim I had not only the transport workers do piecework but also (under the scornful shouts of the Marxist papers) the sweepers in the yard and the shops. The last mentioned step resulted in the number of sweepers being reduced to one-third and the wages of the remaining sweepers being considerably increased.

c) I mentioned above that in a sound enterprise the ablest draftsmen concentrate their attention on equipment design. Something similar applies to the field of time study.

Time study is the most important activity in an enterprise and should be performed only by the ablest brains of the enterprise.

Time studies are not only important because they serve the efficiency of the operations, but also they must be the center of attention for the manager of the enterprise because they are the most delicate point of the operations on account of their social and economic effects.

In Ruesselsheim I personally made all time studies of our biggest mass production, the building of bicycles, and in spite of Marxist times and severe measures, I succeeded in creating an atmosphere of mutual trust. *This atmosphere of mutual trust is not only based on the fixing of* *piecework rates which has to be strict, but under all circumstances fair, but also especially on the fact that piecework rates, once fixed, will not be changed later by any means unless new labor-saving methods are introduced.*

On this occasion, I must speak of the deep-seated cancer of most enterprises which consists in an automatic "adjustment" of piecework rates in case of increased earnings from piecework. *Such a step creates, so to speak, a secret piecework limit and induces the crew to slow down.*

There exists, also at C. & E., as in other enterprises, such a slow-down which is proven by the income of the pieceworkers that adjusts itself periodically. It is a matter of course that the present system can be given up only if each individual piecework contract has been conscientiously fixed. After that had been done in Ruesselsheim, I let the matter, so to speak, take its course and each individual pieceworker had a chance to earn as much as he wished. While previously the production of individual workers varied at most 5% under the same piecework arrangements, *the results afterwards showed differences of more than 30% in their earnings,* corresponding actually to the differences in their human abilities and human diligence.

d) We have seen that it is advantageous first of all to the wage computation to put some workers in groups, for instance by fixing one piecework rate for the entire machine assembly section but having the work carried out not by one man but by any size group of men and distributing the computed piecework earnings in equal parts among all members of the group. I found that piecework done by groups promotes comradely cooperation and that, by this measure, the amount of work and the earnings of the individual worker increase. Group piecework which I introduced at Opel's when we started with continuous production turned out to be such a tremendous success that there was practically no longer any individual piecework arrangements and groups of more than a hundred men were formed on a common computation basis which resulted in an extraordinary simplification of the wage computation and great savings in the Bookkeeping of the enterprise.

e) It is customary in most enterprise to count the number of the pieces after they have been finished or otherwise, to count them at intervals on certain fixed days. This counting work means a lot of labor and in large part unnecessary work for the supervisors. For that reason I introduced a continuous control according to which no counting at all took place any longer within a section; the control was exercised only by having the following section to which the parts were delivered confirm the number of pieces which it had received and by crediting the section that made the delivery correspondingly not only as to wages but also as to the material and debiting the section receiving the delivery with the material. In order to eliminate the intermittent countings, I granted advances in an approximate amount of the preceding average earnings. Incidental controls of quality were made only to secure uniformity of measures, appearance of the merchandise and the like in connection with which the supervisors formed an independent section of the plant and, in addition to that, were not responsible to the foremen or plant managers but in order to emphasize their independence, directly to the top management.

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f) Apart from the actual working time and certain additional pay for time spent in tool changes and so on, the usual time study proceedings include general additional pay for the time needed for getting the tools from the storeroom and sometimes also for their preparation.

The aim of the time study shall be to find out not only the normal capacity of a worker but also to secure the full utilization of the machines in operation. For that reason I relieved the highly qualified machinists of all work of minor importance; especially I cut out the very popular standing around in front of the supply rooms by sending helpers from the storerooms regularly through the sections and having them deliver to the machinists the tools needed, materials, etc. As a result of this arrangement, I achieved not only a considerable cutting down of the working time and a better utilization of the machines but, in connection therewith, a quicker circulation of material.

g) Important also is the consumption of operating material. On the basis of empirical figures I ascertained how many grams of operating material including lacquer, lubricating oil, sanding material, polishing rags, cleansing agents and so on were used for each bicycle produced and made a complete list with the index figures for the various materials in the various sections. Corresponding to the production the storerooms received the order to give out a specific amount of material based on the index figures. By special training I succeeded in a short time in keeping not only to the index figures which were set low anyway

Defendant's Exhibit 140

> but even in reducing them in the case of a production of 3000 bicycles per day, by multiplying the index figure by 2500.
>
> I also promised the foremen premiums for all suggestions which led to savings of material or to a voluntary reduction of the index figures. This procedure could be applied also in the production of machine tools, if not in the same way, at least to a smaller extent.

In the foregoing, dear Mr. Vogel, I tried to let you know my attitude as to the task assigned by the Board of Directors and I am fully aware of the fact that I discussed many well-known matters too extensively, and on the other hand, for the sake of brevity, other matters too briefly. Nevertheless, I hope to have given you a few valuable hints, and especially certain general directives according to which you can begin your work and we can continue our discussion on various items.

If I should not have expressed myself clearly enough on the one or other point, do not hesitate to tell me; at the same time, I request you to comment point by point and as exhaustively as possible on my various proposals and their application to C. & E. I request you especially to inform me at some time, in detail, on the present method of your time studies and the computations applied by you in this connection.

I remain,

with my best regards,
yours,

for Mr. Fritz von Opel
by

Defendant's Exhibit 141

Collet & Engelhard
Machine Tool Factory
Incorporated

Offenbach on the Main, September 22, 1938
Telephone 81141

Management
Erich Vogel VDI
[Member of the Association of German Engineers]

Mr. Fritz von Opel,
Certified Engineer
at present New York
c/o Bayer & Clauson
67 Wall Street.

Re: Your letter of September 12, 1938

Dear Mr. von Opel:

Following our conference I immediately proceeded to reexamine the time needed for the production of our two BFK models.

The studies have been done in the most conscientious manner and for that reason have taken quite a while, especially considering that regular work was not to be interrupted.

A considerable time ago we *finished* the studies. I thought that I would have a chance to discuss the matter personally with you and thus I am sure receive further valuable suggestions.

According to the recent findings we saved 12% per machine in mechanical work and 9.6% per machine in the

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mounting; I hope that, in addition, small savings in material costs can still be made.

Mr. Bock, the time checker, whom I can only again highly commend for his performance and experience, has not received any payment yet. I am going to attend to it now. I intend to pay Mr. Bock RM 200.00 and to Mr. Wagner, the time checker for the mounting, the amount of RM 120.00 as a lump sum payment. These amounts correspond to the savings in wages with respect to one machine.

Dear Mr. von Opel, with reference to my conference with you I request you to confirm the increase in my monthly salary beginning June 1, 1938 in accordance with your proposal.

I thank you for that very much and I assure you I shall promote the interests of our firm in the future to the best of my ability.

The volume of business has continued to develop very satisfactorily, the demand for our products is very brisk, as before. I am happy to say that deliveries have also considerably increased in comparison to the previous year.

Our building program has progressed to the point where I hope to have the premises in use before the winter starts.

I wish you a good return trip and remain,

Yours faithfully,

/s/ Vogel

Defendant's Exhibit 142

St. Moritz,
Haus Kulm, January 10, 1939

Mr. H. Abbetmeyer
Frankfurt on the Main
Ulmenstrasse 32.

Dear Mr. Abbetmeyer:

I refer to the telephone conversation I had with you from Frankfurt on December 22, 1938, concerning Mr. Vollrath junior. In the meantime, my father had the opportunity to meet Mr. Vollrath, and he has the very best impression of him, which indeed was to be expected not only on account of his education but also on account of the influence of Mr. Vollrath senior.

Mr. Vollrath is now employed by BMW and would have to give notice on February 15, for July 1st of this year. Mr. Vollrath at present earns "about RM 500." and in his written application of November of last year he then informed COLLET & ENGELHARD of the salary he expected. As far as my father can remember, it amounted to RM 550 to RM 600.

You probably agree with me that it is of great interest to us to engage Mr. Vollrath junior, particularly because in so doing we maintain our valuable connection with the firm of Opel and with Vollrath senior. Aside from that, a little "new blood" cannot do any harm.

As far as Mr. Vollrath's field of activity is concerned, I am of the opinion that initially he should be put to work on the efficiency program for the mechanical divisions, and that possibly he should be put in charge of the entire

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time-study division which, as has been proven, is in a bad state.

I now ask you to let me have your reply, as promised, regarding the manner in which Mr. Vollrath's employment is to be effected. Either the managing board could consider the employment and establish contact with Mr. Vollrath directly, or the board of directors could propose the employment on its own initiative. I should, of course, like to observe the proper form as far as Mr. Vogel is concerned, but do not want to be diverted from my objective.

With kindest regards, I remain

always yours

Defendant's Exhibit 143

St. Moritz, April 4, 1939
Haus Kulm

To the Managing Board of the firm of Collet & Engelhard
Offenbach.

Dear Mr. Abbetmeyer:

Dear Mr. Vogel:

I have been informed by the firm of Schlegel & Volk that you require, on priority, a drilling machine with a spindle diameter of 85 mm, for your Schwarzenberg plant. Since Mr. Volk is willing to deliver in return on priority, from his previously promised deliveries, a machine tool which is urgently needed in Offenbach, I assume that we should make the delivery on priority. At any rate, I should be very grateful to you if you would seriously examine this question, the more so as we have repeatedly asked for favors in the past, especially for the Wiesbaden machine tool factory.

Furthermore, Mr. Volk is interested in the delivery of another Keller copy milling machine. Mr. Volk, who, as he writes, still considers himself a businessman and not a speculator, considers a delivery time of 40 months too long, which I fully understand. In this case, too, I ask you to see to what extent we can meet Mr. Volk's demands, and, for the sake of simplicity, you can notify him directly of the result of your examination, referring to his letter to me.

Dr. Gros sent me an invitation for the meeting on April 18, to discuss the annual balance sheet, which meeting I

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hope to attend, if my doctor allows me to travel by that time.

Until then I remain

With German greetings

Yours

Defendant's Exhibit 144

Dr. Daniel Gros
Attorney
Member of the National
Socialists Lawyer's League

Berlin W 62, April 6, 1938
Budapesterstrasse 33
Telephone 250912

Mr. Fritz von Opel,
St. Moritz/Switzerland

House Kulm

Re: *Machine Factory Wiesbaden Inc.*

Dear Mr. von Opel:

The Dresdner Bank is pressing for the repayment of its credit of RM 150,000. The officials concerned had invited me to a conference on the matter. From the discussion, I received the impression that Mr. Staben does not enjoy the full confidence of the bank and that the prevailing opinion is that Mr. Staben is mainly interested in sales volume and pays less attention to a profitable technical execution of the orders. As you see, the gentlemen have made correct observations. I reassured them and, among other things, pointed out that the technical management was in the hands of an experienced specialist, Mr. Boettger, and furthermore, that the board of directors had asked the gentlemen of C. & E. to give advice on occasion in technical matters.

Mr. Staben, who so far has not succeeded in obtaining the Bafio loan contemplated a year ago, now thinks that he can get it after the balance sheet for the past business year has been completed, and Mr. Staben intends to apply to Bafio for RM 275,000. Mr. Staben acts very optimistic

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about it, but I have the greatest doubts whether Bafio will grant a credit in that amount. The Bafio credit would be very welcome because it is comparatively cheap and would supply the enterprise with the necessary new funds.

After the Machine Factory Wiesbaden had received the order of the Hermann Goering Works, and you had written from St. Moritz asking for detailed information concerning the individual phases of the technical handling, Mr. Staben requested the permission of the board of directors to hire another technician, in addition to Mr. Boettger. After the board of directors had given its consent, Mr. Staben entered into negotiations with Chief Engineer Geyer of the firm Stotz AG., Stuttgart. However, nothing came of it, because the Labor Office refused its consent. According to Mr. Staben, the real reason is that the firm of Stotz subsequently raised Geyer's salary considerably in order to keep him.

Mr. Staben proposes salary increases for the two prokurists Boettger and Uffelmann. As a reason, he states that in general the salaries of employees holding responsible positions had been increased, and also that the gentlemen had been working very hard. Mr. Staben thinks the salary of Mr. Boettger, who has been getting RM 750, should be raised to RM 1,000, and the salary of Mr. Uffelmann, who has been getting RM 600, to RM 750.

As you know, Mr. Staben himself is getting RM 1,500 per month. A fixed bonus has not been promised to him. For the business year 1936 the board of directors had granted the following bonuses:

Mr. Staben	RM 6,000.—
Mr. Boettger	RM 1,500.—
Mr. Uffelmann	RM 1,000.—.

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Please let me know what you think about the bonuses to be granted to the gentlemen for the past business year. I shall then be in a position to submit your opinion at the meeting of the Board of Directors. I suspect that Mr. Staben will also ask for a salary increase. What do you think? It seems to me that the increases suggested for the prokurists are rather generous.

As you will remember, last fall Geheimrat Klein had expressed his desire to resign from the board of directors. Since it would make a very bad impression to the public if he at the same time stayed with C. & E., I think it would be the best thing if you wrote him personally that you attach great importance to a continuation of his services for another year on the board of directors. On this occasion I remember that Mr. Abbetmeyer told me a few days ago that you had promised him before Christmas that he would be elected to the board of directors of the Machine Factory Wiesbaden. Please write me about this matter also, so that I may be informed.

Finally, I do not wish to conceal from you that I heard yesterday that Mr. Staben bought an Opel "Admiral" for the Machine Factory Wiesbaden!

Recently I talked with Mr. Staben for several hours concerning the status of the business and related matters, but in this respect I wish to wait for the report of the auditors company, which report I will send to you on receipt.

With best regards,

Sincerely yours,

/s/ Gros

Defendant's Exhibit 145

Kampen/Sylt, August 25, 1938
Haus Norderkliff

Director Staben
c/o Machine Factory Wiesbaden
Wiesbaden
Post Office Box 59

Dear Mr. Staben:

I hope that you feel satisfied upon returning to Wiesbaden from your Hamburg trip; satisfied, first because you were able, contrary to all expectations of the other parties concerned, to keep your promise to Mr. Uffelmann, and secondly because you are the manager of an enterprise which started from nothing and seems to develop slowly into a million-mark business in terms of capital.

I assume that you yourself were somewhat surprised about the favorable turn which events have taken, and I feel obliged to tell you in private, of another reason therefor in addition to those mentioned publicly.

So far as the possibilities for an expansion and a sound development of the Machine Factory Wiesbaden have of necessity been limited, and it is no secret that the enterprise was suffering from excessive overhead, especially salaries, because of its relatively small sales. Therefore, there were just two possibilities to put the enterprise on a sound basis: either to adapt the overhead to the modest sales or to increase the sales, so that the present overhead could be absorbed. The first way would have been painful, not only because any stagnation is depressing, but, primarily, because you yourself would have seen no possibilities in

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Wiesbaden any longer and would, of course, have looked for another position.

Disregarding purely financial interests, I decided on the second way, on the one hand because I sympathize with your optimism and your eagerness for work, and on the other hand because I always try to act on the beautiful American slogan "Give him a chance"! This chance, my dear Mr. Staben, you are now holding in your hands. It consists of the opportunity to turn a dump into a factory, and a perennial problem child into a financially strong enterprise, and the circumstance that you will deal, in the future, more than ever with a board of directors which is reasonable, progressive, and constructive, a happy coincidence which is not very often to be found.

I know you to be too sensible and objective so that I do not need to fear that you will allow yourself to be unduly intoxicated by present prospects. However, I wish to say nevertheless that the enterprise will have to prove first that it is sound, because for the time being all hopes are only on paper. More than ever, efforts must be made to save expenses and increase production efficiency, and, above all, the orders we have discussed must be filled without delay and the equipment must be procured with the greatest diligence.

The purpose of my letter is to ask you not to take any vacation, until all inquiries and orders regarding the development of the 3rd and 4th assembly lines have been taken care of, and the financial questions, such as capital stock increase, foreign-exchange license etc. have also been clarified. When I come to Wiesbaden in the middle of September, I wish to be certain that everything has been done,

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not only to hold on to but to increase our position of supremacy in radiator construction.

With best regards, I remain

Yours

signed F.v.O.

copy to Dr. Gros, Berlin

Defendant's Exhibit 146

St. Moritz, Sept. 12, 1938
Haus Kulm

Director Staben
c/o Machine Factory Wiesbaden Inc.
Wiesbaden
P.O. Box 59

Dear Mr. Staben:

Many thanks for your kind letter from your vacation, during which time you have had a good rest, I hope, after a year of strenuous work.

Owing to my earlier trip to Rüsselsheim, I have changed my traveling plans in that I shall take the "Ile de France" on the 15th of this month to go abroad, where I can be reached during the next few weeks c/o Bayer & Clauson, New York, 67 Wall Street.

As you have probably been informed by Messrs. Boettger and Uffelmann, I have already made the visit in Wiesbaden which I had planned, and discussed some basic questions with the gentlemen, which I repeat once more in the following:

I am of the opinion that the terrain should not be cut by a street as originally contemplated, but that the loading platform should be planned adjacent to the public road running along the lot. Instinctively one is inclined to expect a better control if the loading is done within the plant, and another control is made by the gatekeeper. However, from a technical standpoint, this is not justified, considering the goods which we ship. No gatekeeper is able to make a recount of the radiators loaded on trucks and trailers, or

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to check the numerous containers in the trucks. Therefore, it seems much better to me to keep the trucks away from the plant and to entrust the control of the loading ramp to a sales official. Besides the better control, we save space by using the public road instead of our own street and do not tear up our property, so that we can have the warehouses which are to be built put up directly adjacent to the present buildings.

Another suggestion was to do the planning in such a manner that, initially, the 3d and 4th streets are built, as contemplated, but that we consider, even at this time, an "ideal plan" according to which all streets are to run parallel from the feeder rails toward the halls, and that, upon leaving, the radiators are to be attached to a conveyor running transversely to the streets and then subjected to a more or less automatic lacquering process. As soon as streets 3 and 4 are standing, we would build streets 5 and 6, and, as I hope, other streets too, soon, according to the ideal plan, and then eventually we would rearrange streets 1-4 according to requirements.

To be sure, all this sounds like music of the future, but we should think over at this time what the ideal solution would be, in order to avoid unnecessary construction work and to make the necessary changes in buildings and transportation facilities.

Furthermore, I explained to the two gentlemen how I operated the conveyor belts in Opel bicycle construction, where I produced one bicycle every 6 seconds. They were running directly from the belt in a zig-zag line through a shipping warehouse and past the loading ramp. Normally the bicycles moved from the production belt directly to the railroad cars; only seldom were they deposited in the ship-

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ping warehouse or exchanged for types required at a given time by the loading station. In the same manner I should like to have things handled in Wiesbaden.

The conveyor is a warehouse at the same time, but it is conducted through a shipping and interim-warehouse, so that parts of radiators can be added or exchanged. Normally the radiator, coming from the testing tank, should not be touched again before it gets to the loading ramp. Counting machines should be placed at the beginning and end of the loading ramp and the difference in their totals would show the number of pieces shipped.

I suggested to the two gentlemen that the conveyor be constructed in such a manner that the radiators will hang transversely on the convergent, that means, that the greatest possible number of radiators per running meter can be suspended. This would require that the chain conveyor be made heavier, but the rotating speed can be decreased considerably. The holding mechanism on the conveyor is much bigger, and the radiators can be put on and taken off more easily.

It seems important to me that we take up the question of *lacquering* immediately. I am very much against the greasing of radiators, as it makes them look unattractive, especially when they get dusty during transportation on motor vehicles. Therefore I suggested that we coat the radiators with a quick-drying undercoat, and I named as an expert in this field my supplier for many years, Prof. Weschke, of the firm of Turm & Weschke A.G., Magdeburg. Prof. Weschke will be glad to advise you as far as the choice of undercoat and drying apparatus is concerned. In my opinion a drying process with air of room temperature together with a ventilator should be sufficient.

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These, on the whole, are the technical recommendations I made to the gentlemen. Furthermore, I discussed with the gentlemen, as well as with Dr. Gros, an important idea, namely, whether it would not be advisable to establish a separate radiator sales company with a small authorized capital stock, which, on its part, would give manufacturing orders to Wiesbaden.

If we succeed in making the profits calculated by you, it seems preferable to me to realize them through the sales company, which, on its part, can finance Wiesbaden by loans, etc. In my opinion we should keep separate the profits from radiator construction as far as the public is concerned, in order not to give outsiders the false impression that the steel-construction firms are rolling in money. This question need not be settled today or tomorrow, but I ask you to think it over, so that we can discuss it when the occasion arises.

If nothing intervenes, I hope to be back at the beginning of November and should be pleased if the production of radiators and the other endeavors will have made the progress planned.

Nothing more for today, I remain with best regards,

Yours

P.S. I forgot to mention that I suggested that the Trafe-radiators be immersed lengthwise, suspended vertically, and, if necessary, be wiped on the bottom with a broad brush after draining, in order to prevent dripping. This way, I believe, RM 12 wages per day could be saved.

Copy to Dr. Gros, Berlin,

Copy to Director Abbetmeyer.

Defendant's Exhibit 147

At present Hotel Dolder
Zurich

September 26, 1939

Mr. Hermann Raedecker
Rottmersleben 30
Haldensleben Land
District of Magedeburg.

Dear Mr. Raedecker:

Owing to unforeseen circumstances, I am sorry to say that at the present I am not in a position to carry out my plans concerning the breeding of pigs on the forest estate of Wilhelmsruh.

I have noted your kind offer and will refer to it as soon as conditions have changed.

Hail Hitler!

Defendant's Exhibit 148

Graduate Engineer Fritz von Opel

z.Zt Palm Beach
244 Arabian Road
February 9, 1941

German Consultate General
Att. Mr. von Knoop, Commercial Attache
17 Battery Place
New York

Dear Mr. von Knoop:

Many thanks for your kind letter of February 5th. Evidently, it refers to the contents of a letter recently received from my father, in which he asks me to consider whether I would take the place of my deceased uncle on the Board of Directors of General Motors, i.e. Opel A.G. In view of the fact that since Mr. Mooney's departure from Europe in April '40 my father has had no opportunity to talk to representatives of General Motors, and since he apparently is not informed how the attitude of American business in particular has changed towards Germany, I am of the opinion—and I informed him accordingly—that his suggestions, well-meant as they might be, must be postponed to a later date. Moreover, the decisive factor is not my "considerations", but exclusively the invitation of General Motors, and it would show little tact on my part if I were to attempt to influence their decisions. But even if a positive suggestion were made by General Motors, it would be doubtful that I could comply with it at the present time. I do not think it right to accept a position the duties of which one cannot fully perform because of the prevailing circumstances.

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I have explained this matter at such length because unfortunately I have no opportunity to discuss it with you in person, as I am going to be busy for some time in the southern states and shall probably not come to New York in the meantime. In case, however, contrary to my expectations, the matter in question concerns something else, I have asked Mrs. von Opel, who is leaving for New York one of these days, to call you immediately, and if necessary to arrange for an appointment with you or with the gentlemen of General Motors.

Your involvement in this matter is apparently due to the fact that it is impossible to send telegrams, even those dealing with business matters, from Germany to private addresses, and I wish therefore to express to you my special thanks for your very kind efforts.

I remain

Yours sincerely

Fritz von Opel

Defendant's Exhibit 149

Shreveport, La
February 13, 1941

German Consulate General
Att. Mr. von Knoop, Commercial Attache
17 Battery Place
New York

Dear Mr. von Knoop:

Many thanks for the interview which you kindly gave to Mrs. von Opel. Much as I regret that it was impossible for you to hand over to her the telegram in question for transmittal to me, I understand from Mrs. von Opel's report that the matter in question concerns not the position on the Board of Directors, but apparently a possible repurchase of the Opel stock by my family, which problem has been considered repeatedly, by myself as well.

I am, of course, willing to take part in these negotiations, or to conduct them, provided that I be properly authorized to do so. Since this is a matter of considerable importance, I have asked for the advice of my attorneys—for the time being in abstract form only—as to whether and in what manner I can take part in such negotiations, in view of my status as a visitor and of my other interests in this country. The reply of my attorneys was that there could be no objection to my participation in itself, but that, pursuant to the provisions of the Propaganda Agency Act of 1938, I am required to notify the Department of Justice of my planned activity from the very beginning. Upon my retort that I would not be representing a "foreign government" but that the authorization came from a private person, namely, my

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father, the attorney replied that particularly in view of the German foreign exchange controls, a transaction of this scope could not be concluded without the cooperation of the german government and that therefore I would undoubtedly have to be considered an "agent" in the meaning of the law. The way I see it, this would certainly be the case if the authorizations to that effect were to be transmitted through the official representatives of the Reich.

I myself in the course of the past year have already had such unpleasant experiences with unreasonable suspicions voiced by private persons, and even leading newspapers, and I have established that I was followed by the F. B. I. agents even to the most remote vacation spots, so that ever since I have decided to withdraw from even social contacts of any kind with other industrialists, and especially with the gentlemen of General Motors, and to visit only such places where my presence is plausible and absolutely necessary by reason of my business interests which are sufficiently known in Washington. I am convinced that you will understand and approve of my endeavor to avoid unnecessary tensions; this is in the interest of all non-Americans living and working here and especially in the interest of German-American relations which unfortunately are already seriously impaired. From all these considerations you will also understand that it would by no means be easy for me to accept the proposition of my father, for my being registered as a so-called agent would lead to the most unpleasant complications in case of a war.

Nevertheless, I suggest on the basis of the foregoing that you or I send the following telegram to my father (Wiesbaden, Steubenstr.):

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> Ready to conduct negotiations must however formally notify authorities here by reason of applicable legal provisions. cable your decision.
>
> Fritz

Since in the immediate future I shall be travelling and my address will be changing, please give your answer to Mrs. von Opel, Hotel Pierre, for transmittal to me.

Thanking you most cordially once again for your efforts in this matter I remain

Sincerely yours

Fritz von Opel

Defendant's Exhibit 150

AFFIDAVIT

I, the undersigned Fritz von Opel depose and state:

1st: In spring 1941 while staying in Palm Beach—Fla. I received a letter from the German General Consulate New York, asking me to come to the offices to receive a coded message. The letter explained that the considerable delay in reaching me was caused by the Consulate's difficulties in obtaining my address.

2nd: I replied that I was absent from New York for a prolonged period and asked them to openly tell me by letter what they wanted. In this or the following letter I stated that I was not in a position to receive any secret messages.

3rd: The General Consulate answered, that it was a matter of importance, that it concerned General Motors and that they could not send the cable by mail.

4st: Some time later after my return to New York I discussed this matter with my lawyer Isidore Kresel 15 Broadstreet New York. He first thought that the Nazis tried to involve me in an espionage case and that we should report the matter to the F. B. I. I replied, that this was very unlikely, as the Nazis knew where I stood. I suggested that before bothering the F. B. I. with a mere suspicion, we should first get some evidence. We discussed whether Mr. Kresel should go to the Consulate and then decided that Mrs. von Opel should go. Upon my suggestion we also looked into the regulations of the Alien Propaganda Act and Mr. Kresel drafted a letter to the Consulate, saying that I wanted to stay away from them but that

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Mrs. von Opel would be willing to convey the message to me. This letter or a similar one typed by Mrs. von Opel was sent to the Consulate.

5st: Few days later—after an appointment over the telephone—Mrs. von Opel saw one of the Consuls, who explained, that the coded cable was nothing but a message from my father, who—due to German censorship—had no other way of contacting me. My father wanted me to see one of the leading men of General Motors for the purpose of finding out whether the rumors of a pending sale of the German General Motors factory (the former Opel works) were correct and on what terms General Motors would be willing to sell. (My father is elected chairman by General Motors since 1929.)

6st: Supplied with this information I saw immediately John Thomas Smith, General Counsel of General Motors, whom I had known since 15 years. I told him, that I was personally not at all interested in the matter, but that I regarded it my duty as a former member of the General Motors management to inform them about a chance to sell a plant which for many years to come was worthless for General Motors. I told Mr. Smith, that apparently the Nazi representatives, on the board of directors had asked my father as the chairman to make this inquiry and that nobody but the Nazi Government had the foreign funds to make such an offer. Several such deals had already been reported by the newspapers. Mr. Smith replied, that General Motors had not intention to sell but that they would always listen to a reasonable offer. He refused to name a price but I gained the impression

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that they might accept a cash offer of 20-30 Million Dollars.

7st: I wrote a letter to the Consulate containing a reply to my father's cable, stating that the rumors were false, but that in my opinion General Motors would listen to an offer of 20-30 Million cash.

8th: Shortly thereafter I wrote a letter to my father complaining about the embarrassing situation his cable had put me into and asking him to directly deal with General Motors, should that become necessary.

9th: In Summer 1941, in the last letter I have received from my father, he wrote me that he had not acted on his own behalf but had been asked to do so. I still believe, that it was the Nazi representatives on the board, who were anxious to pay good American Dollars for a factory, which now is but heaps of rubble.

/s/ Fritz von Opel
Fritz von Opel.

Signed and sworn to before me this 19th of June 1944.

/s/ Raymond E. Bunker
Raymond E. Bunker
Officer in charge
of the Alien Detention Station
Algiers-La.

Defendant's Exhibit 151

February 3, 1947

Schweizerische Kreditanstalt
Zurich.
Paradeplatz .

With reference to my conference of today with your Mr. Schaer ? of the Safe Deposit Section, I ask you to confirm that in addition to Mr. Fritz von Opel only Dr. Hanns Frankenberg and Mr. Adolf Gaeng have a power of attorney concerning the safe deposit box 1923 with your bank, and that according to your investigation safe deposit box No. 1917 was rented neither by the 3 aforementioned gentlemen nor by the Overseas Finance Corporation Ltd., Liestal, and that therefore my assumption was erroneous.

I also request you to confirm that the Swiss Compensation Office opened safe deposit box No. 1923 and that as the record shows, the following objects

(please list individually)

are kept in it.

Please inform me if your investigation should show any other facts.

Sincerely yours,

Defendant's Exhibit 153

Translation

from

REICH TAX GAZETTE [Reichssteuerblatt] *1933*

Pages 661-662*

No. 520. Parents who transfer their real property to their children by a written contract may, even after the children have been entered as the owners in the Land Register, be treated as the (beneficial) owners for tax purposes, depending upon the extent of the rights reserved to the parents.

—§ 98, paragraph 1, sentence 1, of the Tax Code.—

Decision of the Reich Tax Court of May 18, 1933—III-A 152/32—.

Excerpt from the Reasons for the Decision:

Mr. and Mrs. J. B. and M., nee W., residing at A., have leased their vineyards to their four children, the appellants herein, since August 1, 1919. By an instrument executed before a Notary on December 30, 1922, they transferred ownership of the vineyards to the children, reserved for themselves a usufruct right in these vineyards to be entered in the Land Register, and stipulated that the lease was not to be affected by the transfer of title. This agreement was implemented and supplemented by an additional lease contract in 1924, which inter alia expressly provided in clause 1 that the lease was to continue despite the change in ownership that had occurred on December 31, 1922, and subject to the usufruct right granted to the parents. The buildings forming part of the estate were expressly exempted from the transfer of ownership. Consequently the lower tax authorities assumed the existence of two economic units, namely, one unit comprising the vineyards which belonged to the children, and another unit comprising the buildings which belonged to the parents. The appellants, opposing this determination, seek a declaration to the effect that the vinicultural property is a single economic unit comprising both the vineyards and the buildings, which is to be attributed to the parents either on the theory of beneficial [literally "economic"] ownership (section 80 of the Tax Code) or on the theory of a legal situation similar to a continued community of property (section 9, 3d sentence, Reich Assessment Act). The lower tax authorities denied this petition, the Main Assessment Committee giving the following reasons: That a continued community of property under section 1483 of the Civil Code was predicated upon the death of one of the spouses; that section 80 of the Tax Code had not changed the civil-law concept of ownership for purposes of tax law but had merely supplemented it; and that the legal appraisal of the situation was not changed by the clause in the conveyance which provided that the liability for taxes and other public charges was not to pass to the transferees until after the usufruct right of the parents had terminated, since that clause was effective only as between the parties internally.

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* Translator's note: All italics are underscorings in the original.

The appeal is well founded in law.

Section 80 of the Tax Code in a great many cases, as shown by the court decisions, leads to the result that for purposes of the tax law a *beneficial* ownership is recognized as distinguished from the ownership of civil law. The de-

Defendant's Exhibit 153

cision of the lower tax authorities herein must therefore be reversed for legal error. The matter is ripe for decision. A beneficial owner in the meaning of section 80 of the Tax Code is a person who possesses a thing as belonging to him. This concept is essentially identical with the concept of proprietary possessor in section 872 of the Civil Code. In the present case the legal situation is similar to the one in the case decided by this Chamber on April 26, 1932 (Reich Tax Gazette 1932, page 662). The parents have reserved to themselves not only the usufruct right but all rights of disposition belonging to an owner, with the exception of the formal title entered in the Land Register. The appellants have convincingly explained that the purpose of the notarial act was not to divide and distribute the property but merely to secure the continued joint running of the vinicultural enterprise after the death of one or both parents. The transferees granted to the parents a life-long usufruct right in the vineyards, without any consideration, and obligated themselves not to sell or divide among themselves the land or their shares in the land during the lifetime of the parents, or one of them; the liability for taxes and other public charges was not to pass to the transferees until the usufruct was terminated; the equipment on hand at the time of the first lease (vineyard implements, sprays, dusters, and the like) and the subsequent replacements therefor remained the property of the parents according to the uncontroverted statement of the appellants. In the lease agreement of Easter 1924 the children declared that the conduct of the enterprise was "formally" placed in the father's hands and obligated themselves as lessees to cooperate with their father to the best of their ability in maintaining the enterprise. According to clause 4 of the lease agreement, out of any profits accruing at a given

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time the parents are first to be credited with an amount sufficient to support them in the style of living to which they were accustomed, approximately on the basis of a peacetime consumption of RM 600 to RM 750 a month; the remaining balance was to be distributed among the children. According to clause 6, any bank credits that might have to be obtained were to be taken out in the parents' names. Only the parents were entitled to sell wine by the barrel, although, as a rule, in the case of major sales the children were first to be heard. In clause 10 the children waived any compensation for their labor over and above the aforementioned share in the balance of the profits (with a reservation in favor of F.). Also, in clause 10 the children promise "never to make use of this contract to hold the parents to a commitment which was not intended when the first contract was entered into and which is likewise not intended today"; in case a vote should be taken the parents or the surviving parent, as the case may be, are entitled to three votes.

This arrangement in connection with the uncontested fact that the vineyards have not yielded any profit since 1923 and that from 1915 to 1923 they yielded profits covering only a small portion of the stipulated minimum amount to be distributed to the parents, so that consequently the children so far have received practically nothing, makes it apparent that the parents and the children regarded and treated the vineyards as being beneficially owned by the parents and that the four brothers and sisters did not have within the vinicultural enterprise the rights of lessees to make dispositions and to draw the profits, much less the rights of owners but that they merely held the position of children collaborating in the parents' enterprise, whose wages were neither fixed in advance nor were actually in

Defendant's Exhibit 153

an adequate proportion to the yield—wages, the meagerness of which is understandable only on the theory that the purpose of the formal transfer of title was to secure the succession of the children to the vineyard estate which continued to be *beneficially* owned by the parents until their death. For practical purposes the formal title of the children was without any significance, since it was highly improbable, in view of the usufruct right of the parents as described in the foregoing, that a purchaser might be found willing to buy the vineyards alone prior to the parents' death. The conclusion is, therefore, justified that the vineyards are now, as in the past, beneficially owned by the parents—in other words, that the parents possess the vineyards as owners. It follows that this Court must not only set aside the decision appealed from but also the decision of the first instance and the determination of the assessed value of the property in order to clear the way for a different evaluation of the vineyards together with the farmhouse as a single economic unit of vinicultural property owned by the parents, or one parent, as the case may be.

Defendant's Exhibit 154

Translation

from

REICH TAX GAZETTE [REICHSSTEUERBLATT] *1932*

Page 662

No. 676. Characterization for Tax Purposes of so-called "Farm Settlement Agreements" in Kurhesse.

—§ 80 old version of Reich Tax Code

(§ 98 new version).—

Decision of the Reich Tax Court of April 27, 1932—III A 791/31—.

Excerpt from the Reasons of the Decision:

The disputed question in this case is whether for purposes of tax law the farm property which (with the exception of a few lots) was transferred on July 6, 1926, under a "farm settlement agreement" by the farm-owner X (since deceased) in Y, to his son, should be attributed to the widow of the settlor, the appellant herein, in her capacity as beneficial [literally "economic"] owner or to the son in his capacity as the legal owner entered as such in the Land Register. The lower tax authorities have assessed the taxable value of the property to the widow, whom they consider as the beneficial owner under the terms of the settlement agreement. The appeal of the widow is unfounded in law. The agency below has drawn from the various provisions of the agreement the following conclusions: that the purpose of the "settlement agreement" was merely to secure the future succession of the transferee to the property and that for this purpose also he had been entered as the owner in the Land Register, but that in spite of this formal transfer of title the parents remained the masters on the farm; that this situation was intended to change only if and when the parents retired to the "old people's lot" and that the time for such retirement was to be determined by them at will; that the "authority" which the settlor in clause 4 of the agreement had reserved for himself and his wife, the appellant herein, did not denote merely a usufruct but all the rights of an owner except formal legal title; that this construction alone rendered intelligible the provision of the agreement according to which it was incumbent upon the transferee "to serve his parents as a dutiful child," to help with all the work on the farm and to obey willingly all orders of the parents "exercising authority." This reasoning of the agency below is convincing and free of legal error. It may be added that in the agreement the rights of the transferee are clearly defined and limited to the effect that he is to receive free lodging as determined by the settlor and free board at the common table, together with all support including medical care, futhermore spending money in the amount of RM 300 annually and fodder for one cow. No further right of use is granted to the transferee, nor does he have any further right of disposition. Section 7 of the agreement provides that the parents in authority may, even prior to their retirement, distribute the cattle among the children, which distribution is imposed as a duty upon the transferee in the agreement. The conclusion of the agency below that under these circumstances the transferee, as long as the parents had not retired, had actually the position of a mere farmhand who in addition to free board and lodging was entitled to wages in cash and to compensation in kind, and

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that his legal right to dispose of the property (according to the legal title entered in his name in the Land Register) was insignificant for practical purposes because in view of the legal and economic burdens on the farm it was hardly possible that a purchaser might be found, is free of error. Whether the transferee himself interpreted the agreement differently could not be decisive for the agency below, particularly in view of the fact that his interpretation, which coincided with that of his mother, the appellant herein, may be influenced by his duty of "serving his parents as a dutiful child" as defined in the agreement. The agency below was also entitled to disregard the fact that the transferee has obtained a loan of RM 5,000 from the district savings bank for the purpose of improving the stock and the land, since the appellant herself does not allege that this was done without her approval. The view which the appellant again expressed in her brief, that the "right of authority" did not mean anything more than "usufruct" has been rejected on sufficient grounds in the decision appealed from.

Accordingly the ruling that the appellant, as long as she has not relinquished her "authority", possesses the farm as belonging to herself (§ 80 old version of the Reich Tax Code, § 98 new version) is free of error in fact and in law.

Defendant's Exhibit 155

MEMORANDUM

Mr. Fritz von Opel informed me that he works with the Wehrli-Bank in Zurich. He states that although Dr. Wehrli, the head of the bank, was 100 per cent old stock Swiss, if properly approached he would probably consent to hold himself at our disposal within the meaning of the telegram of September 1st No. 140/1.

Bern, September 4, 1939.

1) X

2) Mr. von Nostitz for his information.

3) To the files. [initials.]

(Marginal note in handwriting: Mr. [illegible name] will endeavor to do this.)

Defendant's Exhibit 156

COPY

TELEGRAM

Dispatched Berlin September *1st* at ....

Received in Bern September *1st* at 4 p.m.

Diplogerma Bern

No. 140/1

Secret.

It is being considered in the event of war to request our missions in such neutral countries with which direct communication would presumably be interrupted to ask the foreign firms of potential interest to us in their country, in particular German firms abroad and German business men, to make available amounts of foreign exchange, cable transfers, checks or sight drafts and sight bills of exchange. The checks or sight drafts and sight bills are to be made out by banks directly to the order of trustworthy, reliable Swiss persons. Wire requested indicating possible persons for such transactions. Exact addresses must be stated.

Wiehl.
353877

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,265—April Term, 1956

FRITZ VON OPEL,
Appellant,

—v.—

HERBERT BROWNELL, JR., Attorney General, as successor to the Alien Property Custodian,
Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
For the
District of Columbia Circuit

FILED JUL - 5 1956

Joseph W. Stewart
CLERK

Questions Presented

I. Whether plaintiff intervener, a citizen of neutral Liechtenstein and not resident or present in enemy territory at any time after December 7, 1941, is an enemy within the Trading with the Enemy Act or an "innocent stockholder" (343 U. S. 156) eligible to recover his proportionate share of the vested assets of plaintiff Swiss corporation which formerly was adjudged to be ineligible to recover any of the vested assets because of an enemy usufructuary interest in its shares (343 U. S. 205).

A. Whether under the Act enemy status by reason of enemy taint is restricted to neutral corporations owned or controlled by enemies or may be extended to neutral citizen individual stockholders of such corporations not present at any time during the war in enemy territory.

B. If enemy taint can, as a matter of law under the Act, be applied to neutral citizen stockholders of tainted neutral corporations, whether on the facts of this case intervener was enemy tainted.

II. Whether plaintiff-intervener, after December 13, 1941, was "resident outside the United States, and doing business within" Hungary within the meaning of §2(a) of the Act.

A. Whether this issue was excluded from the trial by the pretrial determination of the issues to be tried.

B. Whether plaintiff intervener was "resident outside the United States" within the meaning of §2(a) of the Act.

C. Whether plaintiff intervener was "doing business within" Hungary within the meaning of §2(a) of the Act.

III. Whether plaintiff intervener was bound, under the doctrine of *res judicata,* by the findings of fact and rulings of law made upon the former trial of plaintiff corporation's cause of action.

A. Whether the necessary (1) "final" judgment, (2) privity between plaintiff intervener and plaintiff corporation and (3) identity of ultimate issues are present as a basis for invoking *res judicata* against plaintiff intervener.

B. Whether plaintiff intervener's property rights in plaintiff corporation's shares were properly determined under German law to the exclusion of Swiss law which plaintiff intervener requested the District Court to apply.

IV. Whether denial of recovery to plaintiff intervener, a citizen of neutral Liechtenstein, takes his property without just compensation in violation of the Fifth Amendment of the Constitution.

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United States Court of Appeals

For the District of Columbia Circuit

No. 13,265—April Term, 1956

Fritz von Opel,

Appellant,

—v.—

Herbert Brownell, Jr., Attorney General, as successor to the Alien Property Custodian,

Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal (R. 91a, 28 U. S. C. 1291) by plaintiff-intervener-appellant, hereinafter called "intervener," from a final judgment (R. 89a) for defendant-appellee, hereinafter called "defendant," in an action in the United States District Court for the District of Columbia pursuant to the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411), as amended (50 U. S. C. App. §1 *et seq.*), to recover the proportionate share of intervener, as stockholder of plaintiff Swiss corporation, hereinafter sometimes called "Uebersee," in certain assets owned by the corporation before they were vested by the defendant and his predecessors.

Opinions Below

The opinion of the District Court after trial (R. 37a) is reported at 133 F. Supp. 615, and two pretrial opinions (R. 21a, 34a) are reported at 121 F. Supp. 420 and 127 F. Supp. 42.

Statute Involved

Trading With the Enemy Act, C. 106, 40 Stat. 411, as amended (50 U. S. C. App. 1-40):

Sec. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein, shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

* * * * *

Statement of the Case

For clarity the statement of the case is divided into (A) a statement of the prior proceedings and (B) a statement of the facts developed upon the trial of the intervener's rights in the court below.

A. Prior Proceedings Herein

The original complaint by plaintiff Swiss corporation and the amendment of the complaint sought recovery of certain assets vested by the defendant and his predecessors consisting principally of 73,039 shares (out of a total of 140,000 issued shares) of Spur Distributing Co., Inc., a Delaware corporation engaged in the retail sale of gasoline in Tennessee and adjacent Southern states, and also of 345,760 shares (out of a total of 625,000 issued shares) of Harvard Brewing Company, a Delaware corporation engaged in the brewing and sale of beer in and around Boston, Mass. (Vesting Orders Nos. 14 and 17, 7 Fed. Reg. 4399, 4402, 6199; 9 Fed. Reg. 8083). The defendant recently sold the Harvard shares to the highest bidder for cash. The complaint alleged that the plaintiff corporation was not an enemy or an ally of an enemy within the meaning of the Trading with the Enemy Act. This Court, one judge dissenting, reversed the dismissal of the complaint (81 App. D. C. 284, 158 F. 2d 313) and the Supreme Court of the United States affirmed (332 U. S. 480) holding that the complaint stated a cause of action.

Upon remand and after trial the District Court rendered an opinion (82 F. Supp. 602) and made findings of fact and conclusions of law (R. 60a) holding that plaintiff corporation was enemy tainted and could not recover any part of the vested property because of a substantial enemy usufructuary interest in its shares held by intervener's parents residing in Germany. At the conclusion of the trial the District Court refused to determine the separate interest in the vested property of intervener, as the stockholder of the plaintiff corporation, on the ground that this was a new claim not made in the pleadings (R. 24a). On appeal this Court affirmed the District Court, one judge dissenting without opinion (88 App. D. C. 182, 191 F. 2d 327, 89 App. D. C. 167, 196 F. 2d 557), and the Supreme Court affirmed this Court as to plaintiff corporation (343 U. S. 205) but vacated the judgment of this Court and remanded the cause to the District Court for consideration of intervener's application for a determination of his rights in the vested property in the light of the Court's opinions in this case and in *Kaufman* v. *Societe Internationale,* decided on the same day (343 U. S. 156).

Upon remand the District Court granted the intervener's motion to intervene as a plaintiff (R. 2a). The intervener's complaint alleges that the intervener is the sole beneficial owner of all of the 100 issued and outstanding shares of plaintiff corporation (R. 5a) and is entitled to all the vested property or, in the alternative, to that part determined by the Court not to be beneficially owned by enemies within the meaning of the Act.[1] The defendant's answer denied that intervener was the sole beneficial owner of the 100 shares of plaintiff corporation and for a separate defense alleged that intervener was bound and concluded by the findings and conclusions and decision made upon the first trial (R. 7a).

In the District Court's first pretrial opinion dated May 28, 1954 (R. 21a, 121 F. Supp. 420) the Court granted defendant's motion for an order to declare inadmissible on trial any evidence which tends "to contradict or vary the findings of fact and conclusions of law hitherto entered" (R. 31a). In the District Court's second pretrial memorandum opinion dated December 20, 1954 (R. 34a, 127 F. Supp. 42) the Court granted defendant's motion for an order "declaring inadmissible on further trial expert testimony on Swiss law as to the value of intervener's severable interest * * *" (R. 35a).

Upon the trial of the issues raised in intervener's complaint and defendant's answer thereto, as limited by the trial court's two pretrial opinions cited above, the trial court in an opinion (R. 37a, 133 F. Supp. 615) and findings of fact and conclusions of law (R. 72a) determined that intervener could recover no part of the vested assets because he was "enemy tainted" in that he held his interest in plaintiff corporation's shares in subordination to the enemy usufructuary interest of his parents in the shares. The trial court also ruled at the trial, over intervener's objection, that in addition to the issue of intervener's enemy taint there was also in issue on the trial the question of intervener's enemy status as a "resident outside the United States doing business within" enemy territory. The intervener contended that this issue was not within the pretrial and that intervener's counsel was surprised at its introduction upon the trial.

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[1] Ninety-seven shares were held in the name of Frima Trust Establishment, an organization existing under the Civil Code of Liechtenstein and of which the intervener is the sole beneficiary, and the remaining three shares were held by the three members of the plaintiff corporation's administrative board who were permitted to intervene as intervener defendants and filed an answer (R. 9a).

B. Statement of Facts

In view of the pretrial rulings that intervener was bound by the former findings of fact and rulings of law as *res judicata,* the former findings are summarized briefly before stating the facts and the findings upon the trial of the intervener's claim.

1. *Prior facts and findings* (R. 60a-71a).—The Court found that intervener, a citizen of Germany from birth until naturalization as a Liechtenstein citizen on November 21, 1939, never resided in Germany after 1929 but lived in the United States, Belgium and then in Switzerland where he acquired a domicile in 1934 (Fdg. 6, R. 60a). He was in the United States from May 1940 until after the first trial in 1949 (Fdg. 7, R. 61a). By the gift agreement dated October 5, 1931 (Appendix, p. 91) and executed in Germany where his parents resided, they gave intervener, their only son, the remaining 600 shares owned by them in Adam Opel, A.G., a German corporation engaged in the manufacture of automobiles and bicycles in Germany (Fdg. 17, R. 62a). On October 13, 1931 intervener sold the 600 Opel shares to General Motors Corporation which in 1929 had purchased 80% of the outstanding shares of Adam Opel, A.G. (Fdgs. 12, 19, R. 62a, 63a). The proceeds of the sale were transferred to plaintiff Swiss corporation, acquired for the purpose of holding the proceeds, in part for its 100 bearer shares and in part as a loan to the cor-

poration, and the funds were invested principally in the shares of Spur Distributing Co., Inc. and Harvard Brewing Company which were transferred to plaintiff corporation (Fdgs. 20, 21, R. 63a).

Under the terms of the gift agreement the Opel parents retained a contractual right under German law to require the intervener to establish a usufruct *in rem* in the gift and its proceeds and the Court found that on or before June 7, 1935 the intervener did so by placing 97 of the 100 issued bearer shares of plaintiff corporation in a safe deposit box in Zurich and delivering a key to the box to Dr. Hans Frankenberg, managing director of plaintiff corporation, who received the key as agent for intervener's father, Wilhelm von Opel (Fdgs. 32-39, R. 65a-66a). The Court found that Frankenberg controlled plaintiff corporation as agent of Wilhelm von Opel (Fdgs. 43-45, R. 67a-68a). The District Court found that a usufructuary under German law has an *in rem* right in the property which includes (a) enjoyment of the income from securities; (b) copossession of the property with the legal owner; (c) a voice in management to preserve the usufructuaries' rights, and (d) a right to prevent sale of the property (Fdg. 62, R. 73a). Neither Wilhelm nor Marta von Opel ever demanded or received any income of any nature from the usufruct, and Wilhelm von Opel died in May 1948 and Marta von Opel is now over eighty years of age (Fdgs. 53, 56, R. 70a). The findings did not so state but the gift agreement provided that "20% of all dividends and interest received will accrue to Fritz von Opel" (Plaintiff's Ex. 5 on the former trial, App. p. 91), and the Court stated in its opinion that a right created by the gift agreement was "the right of Wilhelm and Marta von Opel to receive 80% of the income" (82 F. Supp. 603).

The plaintiff corporation owned all of the stock of Transdanubia Bauxite, A.G., a Hungarian mining corporation but there was no evidence that Transdanubia's shares were voted from 1940 through 1945 or that after December 7,

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1941 plaintiff corporation took any affirmative steps to sever its relations with its subsidiary, Transdanubia (Fdgs. 29-30, R. 64a). From December 13, 1941 a state of war existed between Hungary and the United States and during October, November and December 1941 Transdanubia shipped bauxite to Germany, and by a contract of March 1940 agreed to ship bauxite to Germany until the end of 1942. However, in the Spring of 1941 intervener refused requests from officers of Transdanubia for additional funds to continue mining operations and suggested that the mines be sold or leased. The record does not reflect that plaintiff corporation or intervener received any income from Transdanubia at any time (Fdg. 31, R. 65a).

On the basis of the former findings the Court upon the first trial of plaintiff corporation's cause of action made conclusions of law that plaintiff corporation was enemy tainted and could not recover because it was "indirectly owned and controlled" by enemies, the Opel parents (Conc. 2-4, R. 71a). The Court also concluded that the circumstances of intervener's acquisition of Liechtenstein citizenship and plaintiff corporation's ownership of its Hungarian subsidiary, Transdanubia, which mined bauxite for the benefit of Germany was "further evidence" of plaintiff corporation's enemy taint (Conc. 5, R. 71a).

2. *Additional facts and findings* (R. 72a-88a). The trial court, holding intervener bound by the findings and conclusions already made, made additional findings in respect of (A) enemy taint, and also (B) enemy status of intervener as a "resident outside the United States doing business within" Hungary, and (C) intervener's severable interest in the vested property.

(A) *Enemy taint.*—The defendant contended both on pretrial (R. 12a) and upon the trial (R. 94a) that as a matter of law the doctrine of enemy taint does not apply to individual claimants of neutral citizenship not resident in enemy territory but only to neutral corporations owned

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or controlled by enemies and, in the alternative, that as a matter of fact on the basis of his activities in respect of plaintiff corporation and otherwise intervener is not enemy tainted. The Court, however, pending a final determination whether enemy taint is applicable at all to individuals of neutral citizenship not resident in enemy territory, accepted evidence and made findings on the activities of intervener (1) prior to September 1, 1939 when war commenced in Europe; (2) between September 1, 1939 and December 7, 1941 when the United States entered the war; and (3) after December 7, 1941, and also made findings (4) in respect of intervener's political sympathies.

1. *Intervener's activities prior to September 1, 1939.*— The Court found that between December 1930 and August 1939 the intervener, a graduate mechanical engineer, made numerous trips to Germany totaling about 10% of the time to attend to his father's business and to participate in sporting events (Fdg. 60, R. 72a). He had no interest in business activities in Germany independent of his father's interests and conducted little or no business there other than as a representative of his father between the years 1934 and 1939 (Fdg. 76, R. 76a). He continually acted for his father and whether because of filial devotion or as his father's heir "it was only natural that he should do so" (R. 49a). From 1935 until 1939 intervener was a member of the board of directors and supervised activities of Collet & Engelhard Machine Tool Factory, Inc., a machine tool manufacturer in which Wilhelm von Opel owned over 60% of the stock. He also supervised activities of its wholly owned subsidiary Machine Factory Wiesbaden, Inc., engaged in manufacturing steel products including cranes, elevators and radiators (Fdgs. 77-80, R. 76a-77a). The intervener and his only sister, Elinor von Opel, were the two members of the Wilhelm von Opel Property Administration Company established to hold the assets of Wilhelm von Opel, including the shares of Wilhelm von Opel Forest Administration Company which owned a large

forest estate in Germany. The intervener, as agent of his father, supervised the management of this estate and litigation involving it (Fdgs. 82-84, R. 78a) and advised his father concerning substantial investments made through the Union Bank of Darmstadt and Berlin. He represented his father in the bankruptcy proceedings of the Bank (Fdg. 85, R. 79a), and was influential in persuading his father to shift his investments from fixed obligations to tangible property as protection against inflation (Fdg. 85, R. 79a). In July 1936 intervener in a letter recommended to his father the purchase of shipping shares, valued at seven and a half million Reichsmarks, stating this would demonstrate to the German government that both of them were willing to act in the interests of the German government at any time (Fdg. 86, R. 79a).

2. *Activities between September 1, 1939 and December 7, 1941.*—The Court found that the intervener, both prior to and after the commencement of the war in Europe on September 1, 1939, continued to have an interest in the welfare of, and sympathy for, Germany but was not a vigorous supporter of the National Socialist regime insofar as it conflicted with his concern to protect his financial investments and his personal safety. He had served as a non-commissioned officer in the First World War but did not serve in the Second World War. He resented fines levied by the German Government upon his father and sister for violations of currency regulations. He was friendly socially with persons prominent in the German government and took pride in the prowess of the German army and extended his aid to the German government in the early days of the Second World War (Fdg. 64, R. 73a).

(a) *Transdanubia.*—The Court found that from 1935 to 1941 intervener actively managed and controlled the policies and affairs of Uebersee's subsidiary, Transdanubia, in the course of numerous trips to Hungary between 1935 and November 1939, and through appointment of agents in Hungary to represent him on Transdanubia's affairs (Fdgs. 65-66, R. 73a-74a). In 1936 he gave powers of attorney to Dr. Salusinszky, a Budapest attorney, to represent him on Transdanubia's affairs, and upon Dr. Salusinszky's death in 1939 similar powers of attorney were given to his law partner, Dr. Timar "who signed in the name of Fritz von Opel for Transdanubia Bauxite, A.G., said acts to be performed on behalf of Uebersee Finanz-Korporation" (Fdg. 69, R. 74a). There is no evidence that these powers of attorney were ever revoked. In November 1939 intervener conducted negotiations in Hungary and a contract was executed in March 1940 for shipment of bauxite to Germany until the end of 1942 (Fdg. 72, R. 75a). The Court inferred that bauxite shipments continued after December 7, 1941 on the basis of evidence that there were shipments in December 1941 and the contract called for shipments until the end of 1942 and in November 1942 Transdanubia repaid a loan (Fdg. 73, R. 75a). Although the Court did not find that plaintiff corporation was doing business in Hungary it did find that intervener's personal participation in the bauxite production in 1939 and his close relation to Transdanubia "made his relation to Transdanubia more direct than that of Uebersee and his father in whose interest he was acting" (Fdg. 74, R. 76a).

(b) *Sigismund von Bibra.*—The Court found that shortly after September 1, 1939 intervener through his attorney in Berlin inquired about acquisition of neutral citizenship for the duration of the war and reacquisition of German citizenship thereafter (Fdgs. 88, 89, R. 79a, 80a). Upon being informed that the matter should be taken up with the German Legation in Switzerland intervener conferred with and corresponded with Baron von Bibra, Counselor of the German Legation at Bern, Switzerland, in September, October and November 1939 (Fdg. 90, R. 80a) and stated in a letter that he proposed to acquire neutral citizenship to preserve the assets in the United States. He was informed that he could proceed to acquire neutral citizenship with the assurance that he would encounter no difficulties in reacquiring German citizenship after the war (Fdgs. 91-93, R. 80a-81a). In response to a telegram from the German Foreign Office in Berlin to the German Legation in Bern on September 1, 1939 requesting the names of trustworthy Swiss citizens who might make foreign exchange available to the German government, intervener suggested to von Bibra the name of a Dr. Wehrli (Fdg. 94, R. 82a).

(c) *Repurchase of Adam Opel, A.G.*—In February 1941 the German Consulate in New York advised intervener of the receipt of a telegram from intervener's father expressing the wish that intervener negotiate with General Motors Corporation concerning a possible repurchase of the stock of Adam Opel, A.G., and thereafter intervener conferred with the general counsel of General Motors concerning the possible repurchase (Fdgs. 95-97, R. 82a-83a).

3. *Activities after December 7, 1941.*—In February 1942 intervener was interned as a "native" of Germany (50 U. S. C. §21), was released in May 1945, and continued to live in the United States until his voluntary departure for Switzerland in 1950 (Fdgs. 58, 59, R. 72a). In addition to his own testimony of his activities in the United States after his arrival in May 1940, the intervener offered the testimony of Irwin Schattmann, who worked with intervener prior to his internment, and the testimony of Colonel Charles Gerhardt Mettler of Army Military Intelligence who interviewed intervener during his internment. This evidence was substantially uncontradicted but despite the numerous findings on intervener's remote business activities in Germany so far back as 1935, the Court made no mention in its opinion and made no findings upon intervener's activities in the United States except the one general negative finding that any inventions or information furnished by intervener while interned were not furnished with any purpose to further the interests of the

United States (Fdg. 98, R. 83a). Mr. Schattmann, however, testified on his deposition, which was introduced into evidence, that he was president of Westminster Industrial Corporation which was wholly owned by plaintiff corporation, and Westminster in turn wholly owned Ergo Machine Works, Inc., operating a machine shop at Dunellen, N. J. which, under direction of intervener beginning in 1940, began to do defense work exclusively, including the making of parts on sub-contracts for Brewster Aircraft and for Curtiss-Wright and for a firm in New York which had a contract with the British Admiralty for torpedo manufacture (R. 157a). Under intervener's guidance Ergo developed a new patented process and machine for hot pressing non-ferrous metals, such as aluminum, by the use of scrap metal instead of bar stock which was in short supply. On June 23, 1941 the intervener wrote to the Office of Production Management requesting assistance to find a percussion press of about 350 tons to prove the merits of the new method of forging non-ferrous metals and stated "that there is a fair chance that this new method will become of extreme importance to the defense industry * * *" (R. 818a). As a result of intervener's efforts the necessary priorities were obtained and the representative of the Office of Production Management assigned to supervise and inspect the job declared his full satisfaction with the results (R. 159a). In addition the intervener invented a new type of fastener for airplane cowlings (R. 160a). Intervener testified that he applied for and obtained a patent on the fastener and that it was successfully tested by the Air Force at Wright Field (R. 236a). Mr. Schattmann also testified that intervener condemned the political philosophy of the Nazi Government in Germany in very strong terms (R. 164a).

Colonel Mettler testified in his deposition, which was introduced into evidence, that he had been with the Ordnance Department of the Army from 1909 until 1939 and was recalled to duty as Officer in Charge of the Miami, Florida office for the Military Intelligence Division in 1942 (R. 173a). He testified that intervener gave him considerable information about the production of rockets for military purposes and about types of bombs to be used in the destruction of bridges and other installations. Colonel Mettler testified that although at first suspicious of the intervener's motives in giving the information, he later became convinced of his sincerity in his effort to help the United States and he reported to his superiors in 1944 that the intervener "has given upwards of fifty excellent reports on German situations and German conditions and that he continues to be an excellent source of information on Germany" (R. 184a). The Court ignored all of this uncontradicted testimony of activities between 1940 and 1944 in its findings and opinion concerning the conduct of the intervener before and after the United States entered the war.

4. *Intervener's political sympathies.*—The Court merely found that intervener was not a vigorous supporter of the National Socialist Government in Germany insofar as it conflicted with his financial investments and personal safety, that he was friendly socially with persons prominent in the German government and aided that Government in the early days of the Second World War (Fdg. 64, R. 73a), and that prior to the outbreak of the war he numbered among his friends several persons prominent in the Nazi Government (Fdg. 99, R. 83a). But there was substantial testimony that intervener hated the Nazi regime not only from the testimony of a number of witnesses but implicit and unmistakable in the intervener's own activities. He never resided in Germany during the Nazi regime even though his parents continued to live there. For years he endeavored to get assets out of Nazi Germany and thus was certainly opposed to the policies of the Nazi government which even strongly resented the sale of Adam Opel, A.G. to General Motors years before the Nazi regime was established in Germany (R. 214a). It was not questioned

that he numbered among his friends prominent anti-Nazi Germans such as the novelist Erich Maria Remarque, author of "All Quiet on the Western Front" (R. 187a, 216a). The witnesses supported these objective facts by their testimony that he had denounced and hated the Nazi regime in Germany (Schattmann, R. 164a; Mettler, R. 176a; Alexander, R. 187a; Gross, R. 484a; Schaberger, R. 509a; Schaecker, R. 520a). When the war started in Europe intervener's conduct was unambiguous in its opposition to the Nazi regime in that he refused to observe the German Army's mobilization order sent to him in Switzerland and instead changed his citizenship and came to the United States where he engaged in defense work of the most direct kind in aid of the United States defense and war effort until he was interned in February, 1942, and then he cooperated fully with the Military Intelligence officials who questioned him. This conduct was consistent only with political sympathies against the Nazi government and in favor of the Government of the United States after the two countries were at war.

B. *Enemy Status.*—The Court below in its opinion Part "I. Enemy Status" (R. 38a) held that intervener in addition to enemy taint was a statutory or technical enemy in that he was "resident outside the United States doing business within" Hungary within the meaning of §2 of the Act (R. 38a-44a). The findings supporting this part of the opinion (Fdgs. 65-74, R. 73a-76a), already referred to because they also relate to enemy taint, *supra,* pp. 10, 11, conclude with the finding that although plaintiff corporation was not doing business in Hungary through ownership of its subsidiary Transdanubia, the intervener in some unexplained manner because of "his close relation to the activities of Transdanubia, and his strong personal interest in its welfare," was doing business within Hungary after December 13, 1941, although he was in the United States since May 1940 and there was no evidence of any activities after that date by the Budapest attorney, Dr.

Timar, under powers of attorney granted originally in 1936 and renewed in 1939 to act for plaintiff corporation and not for intervener individually.[2]

C. *Intervener's Severable Interest.*—In the District Court's opinion in Part "III. The Value of Fritz von Opel's Severable Interest" (R. 55a) the Court determined his interest in the vested assets in the event that its views that he was not entitled to recover were not sustained on appeal (R. 55a). The Court however ruled in its second pretrial memorandum opinion that his interest had to be determined exclusively under German law, sustained defendant's motion for an order declaring inadmissible expert testimony on Swiss law (R. 35a), and rejected intervener's offer of proof of the Swiss law in the form of depositions of an expert on Swiss law and an expert on German law, and depositions of witnesses establishing the facts upon which the opinions on foreign law were based (Intervener's Exhibit 18, R. 859a-986a). On German law the Court found that the owner of property subject to a usufruct retains the rights not reserved by the donor usufructuaries for life; that upon termination of the usufruct the legal owner is entitled to return of the property, or the ascertainable proceeds remaining when the usufructuary has power of disposition over the property; that intervener's survivorship rights were intended to be a vested remainder subject to a condition subsequent under which the gift would revert to the parents if intervener died before them without legitimate issue; that even assuming Wilhelm von Opel's power of disposition of the property "this does not destroy the rights of the legal owner" (Fdgs. 103, 104, R. 84a, 85a). The last finding of the Court (Fdg.

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[2] The Court below refused to make the specific findings requested by intervener and supported by the evidence to the effect that there was no evidence of the extent or limits of the powers of attorney to Dr. Timar or of any activities of Dr. Timar under the powers of attorney, or that the powers of attorney were not revoked by operation of Hungarian law, or that intervener personally communicated with or did anything in respect of any activities in Hungary after December 13, 1941.

105, R. 85a) is that a German court would evaluate the interests of the usufructuary and the legal owner during the life of the usufructuary according to the estimated income for the property as of December 11, 1941 for the period of the life expectancy of the Opel parents.

Summary of Argument

I. The intervener contends that the Court below erroneously construed the Trading with the Enemy Act by extending the statutory definition of "enemy" by enemy taint beyond corporations organized in neutral territory and owned or controlled by enemies on or after December 7, 1941, to individual stockholders of such corporations who were citizens of neutral countries and never present in enemy territory after December 7, 1941. The intervener contends that the text, history and purpose of the Act require that it be construed to limit the definition of individual enemies to persons resident in enemy territory, or resident outside the United States and doing business in enemy territory, or to additional classes defined by Presidential proclamation under authority of §2(c) of the Act. *Guessefeldt* v. *McGrath,* 342 U. S. 308. Section 32(a)(2)(E) provides a statutory standard for determining enemy taint of a neutral corporation, namely, control or ownership of 50% or more of the stock by enemies, but there is no legislative standard suggested in the Act for determination of "enemy taint" or "innocence" of an individual stockholder of a neutral corporation. Any departure from the basic statutory definition of individual enemy based on residence in enemy territory and any judicial effort to devise a test of individual "enemy taint" or "innocence," in the absence of statutory standards, is impracticable and unworkable and should be left either to Presidential proclamation under §2(c) of the Act or to further statutory definition by Congress. But even if an individual such as intervener, a citizen of neutral Liechtenstein not present in enemy territory during the war, can under a proper state of facts be deemed to be a tainted and non-innocent stockholder, the facts in this case do not supply a basis for such a determination in view of the intervener's activities after December 7, 1941 in behalf of the war efforts of the United States and in the absence of any activities of intervener before or after that date against the United States and in behalf of Germany.

II. The decision of the Court below that intervener, present in the United States from 1940 to 1950, was nevertheless "resident outside the United States, and doing business within" Hungary after December 13, 1941, when war between the United States and Hungary commenced, was erroneous on three independent grounds. Firstly, the issue was outside the issues determined upon pretrial and its introduction at the trial surprised intervener who was not prepared to meet it. Secondly, intervener was not resident outside the United States at any time during the war and the Court merely finds that he was not resident in the United States, fails to find affirmatively where he was resident outside the United States, and a general finding that he was "resident outside the United States" is an insufficient basis for the confiscation of his property. Thirdly, the intervener's renewal in 1939 of powers of attorney granted in 1936 to the Budapest attorney of plaintiff corporation's Hungarian subsidiary was, as a matter of law, a wholly insufficient basis for a determination that intervener was "doing business within" Hungary after December 13, 1941 in the absence of any evidence as to the contents or scope of the powers of attorney and any evidence of whether the Budapest attorneys acted under the powers of attorney after December 13, 1941. In any event the outbreak of war terminated the alleged powers of attorney.

III. The Court below erroneously held in its first pretrial opinion (R. 21a) that intervener in trying his cause of action was bound by all the findings of fact and rulings of law which had been made upon the former trial of the plaintiff corporation's separate and different cause of action. The intervener contends that he was and is entitled to a trial *de novo* on the issues raised by his complaint and the defendant's answer to that complaint unhampered by the former findings and rulings in the former trial to which he was not a party and in which the Court below refused, upon the defendant's objection, to allow him to prove his separate interest on the ground that this was an issue outside the issues presented by the plaintiff corporation's complaint and the defendant's answer to that complaint (R. 24a). The intervener contends that it was erroneous on several grounds to hold that intervener was bound by the former findings and rulings. Firstly, the vacating of the former judgment by the Supreme Court (343 U. S. at 213) prevented a "final" judgment and application of *res judicata*. Secondly, the intervener stockholder and plaintiff corporation were not in privity for purposes of *res judicata*. Thirdly, since the intervener's cause of action and plaintiff corporation's cause of action were separate and different, *res judicata* in any event could apply only to the extent that the same ultimate issues were involved upon both trials. The two issues involved on intervener's trial, namely, his eligibility as a neutral citizen stockholder and his separate interest in the vested property, were wholly different issues from the issue upon the former trial, namely, whether plaintiff Swiss corporation was enemy tainted by reason of an enemy usufructuary interest in its shares.

The intervener also contends that the Court below erroneously held in its second pretrial opinion (R. 34a) that intervener's rights as legal owner of plaintiff Swiss corporation's bearer shares, located at all times in Switzerland, were to be determined not by Swiss law but by German law exclusively because in the former trial the existence and extent of the usufructuary interest in plaintiff corporation's shares had been determined by German law. The intervener contends that this ruling misapplied *res judicata* and also the rules of conflict of laws.

Finally on this point the intervener contends that the Court below erroneously held that the usufructuaries had usufructuary and "other interests" in plaintiff corporation's shares, and incorrectly restricted the rights of the intervener as the legal owner of the shares. The Court also incorrectly held that intervener's right to 20% of the income from the shares was not a right against plaintiff corporation but merely a contractual right against his enemy parents which could not be asserted against the vested property.

IV. The denial of recovery to intervener, a citizen of neutral Liechtenstein never present in enemy territory during the war, deprives him of his property without just compensation in violation of the Fifth Amendment of the United States Constitution.

Argument

The two basic questions presented on this appeal are whether the intervener is a non-enemy eligible to recover any of the vested property in this action and, if he is eligible, what part of the property can be recovered. The opinion below deals with eligibility by considering firstly the intervener's enemy status as "resident outside the United States, and doing business within" enemy territory within §2(a) of the Act, and secondly the intervener's enemy taint. The Court below attributed both enemy status and enemy taint to intervener and then in its opinion and findings went on to determine intervener's severable interest in the property in the event that on appeal he be held to be eligible to claim his interest in the property. The intervener, in his argument on eligibility will consider first the question of enemy taint because it is believed that this is the principal question left undecided by *Kaufman* v. *Societe Internationale,* 343 U. S. 156, and presented in the Court below and on this appeal, and also because intervener contends that the pretrial excluded from the trial the other ground of ineligibility relied upon by the Court below.

This appeal also presents unusual procedural questions because the trial of intervener's cause of action was limited by two pretrial opinions (R. 21a, 34a) holding that under principles of *res judicata* (1) intervener was bound by all the findings of fact and conclusions of law and rulings of law that had been made upon the trial of plaintiff corporation's separate cause of action, and that only evidence supplementary to, but not contradictory of, the prior findings was admissible (R. 21a), and (2) intervener's rights in plaintiff Swiss corporation's shares were governed by German law because German law had been relied upon in the trial of plaintiff corporation's cause of action and Swiss law was not admissible although intervener contended that his rights were governed by Swiss law under applicable principles of conflict of laws (R. 34a). In order that the presentation to this Court of the principal legal issue, namely intervener's alleged enemy taint as intervener analyzes the case, shall not be impeded by the procedural questions, intervener will first argue herein the question of (I) enemy taint and (II) enemy status and (III) the procedural issues involving *res judicata.*

I.

Intervener is not enemy tainted.

The intervener contends (A) that as a matter of law under the *Kaufman* decision (343 U. S. 156) a neutral alien stockholder of an enemy tainted Swiss corporation such as intervener, not resident in enemy territory, is an innocent stockholder entitled to recover his shares of the vested assets, and (B) that even if such a neutral citizen stockholder can be denied recovery as "enemy tainted" under a proper state of facts, this intervener on the facts in the case was not so enemy tainted after December 7, 1941 or otherwise.

A. Intervener, Not Present in Enemy Territory, Is an Innocent Stockholder as a Matter of Law.

The trial Court correctly states in its first pretrial opinion that the Supreme Court's *Kaufman* decision "did not deal with the question whether the term 'enemy' within the meaning of the Trading with the Enemy Act includes enemy taint as applied to individual stockholders" (R. 25a-26a). The trial court in its opinion after trial concluded, without citation of judicial authority, that since intervener holds his interests in the enemy tainted corporation primarily "on behalf" of enemy nationals, his interest is enemy tainted and may not be recovered (R. 47a-48a). The intervener contends (B, *infra,* p. 34) that the facts do not support the trial court's conclusion but for a clearer legal background against which to examine the facts first contends that as a matter of law the phrase "innocent stockholder" in the *Kaufman* decision includes all American citizen stockholders and all non-enemy alien stockholders, that is, aliens neither resident in enemy territory nor resident outside the United States and doing business within enemy territory.

1. Several statements in the opinion of the Supreme Court in the *Kaufman* case, read against the background of the Court's decision in *Guessefeldt* v. *McGrath,* 342 U. S. 308, support the intervener's contention that "innocent stockholder" includes all claimants who are not technical or statutory enemies by reason of residence in enemy territory.

(a) In the *Guessefeldt* decision, reversing this Court's literal construction of the 1948 amendment which became §39 of the Act (88 App. D. C. 383, 191 F. 2d 639), the Court held that Congress, despite the language used in §39, did not intend to depart from the basic statutory policy under which enemy status has always been determined by residence in enemy territory rather than by enemy nationality, enemy sentiments or other standards.

Zander v. *McGrath,* 85 App. D. C. 334, 177 F. 2d 649; *Josephberg* v. *United States,* 152 F. 2d 644 (C. A. 2); *Stadtmuller* v. *Miller,* 11 F. 2d 732 (C. A. 2); *Vowinckel* v. *First Federal Trust Co.,* 10 F. 2d 19 (C. A. 9). The *Kaufman* case was decided against this settled judicial background construing the intent of Congress to restrict the basic definition of "enemies," for purposes of the Act, to residence in enemy territory plus, of course, special classes such as residents outside the United States doing business within enemy territory and agents of enemy governments and classes proclaimed by the President of the enemies under §2(c) of the Act.

(b) The Supreme Court's *Kaufman* decision stated (343 U. S. at 158) that the question was "What part of the assets of a corporation organized under the laws of a neutral country may the Custodian retain where part of the stock is owned by enemies, part by American citizens, *and part by non-enemy aliens?*" (emphasis supplied). Thus the Court implied that the part owned by American citizens and non-enemy aliens, that is, aliens not residing in Germany, could be recovered from the Custodian. A similar implication is found in this Court's first *Uebersee* opinion reversing dismissal of the complaint and stating (81 App. D. C. 284, 158 F. 2d 313, 315) that the purpose of the 1941 amendment of §5(b) of the Act, which permitted the vesting but not the confiscation of the property of foreign nationals who were not enemy nationals, was to "reach with confiscation only that portion tainted with an enemy interest." That purpose is accomplished by confiscation of the severable interest of the Opel parents in plaintiff corporation's shares without confiscating intervener's interest in the shares.

(c) The Supreme Court further stated in *Kaufman* (p. 160) that the right of an innocent stockholder to recover "is based on the Act which enables one not an enemy *as defined in Section 2* to recover any interest, right or title which he has in the property vested." (emphasis supplied)

Thus the Court emphasized that the definition of "enemy" in §2 controls.

(d) The "Second" part of the Supreme Court's opinion in *Kaufman* throughout distinguishes between "enemy" and "non-enemy" stockholders and not between "innocent" and "tainted" stockholders. Thus the Court indicates that the operative distinction is between stockholders who are technical and statutory enemies under §2 of the Act and stockholders who are American citizens or "non-enemy aliens" in the statutory sense and the latter as well as American citizens may recover their proportionate share of the vested assets of the neutral corporation which is tainted because of the enemy stockholders resident in enemy territory.

(e) Mr. Justice Reed's dissenting opinion strongly confirms intervener's construction of the Court's opinion. The dissenting opinion expressly states (p. 164) "The Court's holding permits foreign sympathizers, resident of the United States or neutral territory, not covered by the definition of enemies," to recover. The dissenting opinion explicitly notes (p. 164) that intervener in the instant case "under the Court's opinion in this case, would recover his proportion of the corporation assets * * * ." The complete failure of the Court's opinion to deny or qualify in any way these explicit statements in the dissenting opinion strongly implies that the minority correctly construed the Court's opinion.

(f) In addition to the *Kaufman* decision judicial authority generally does not extend the doctrine of enemy taint to individuals but restricts it to neutral or domestic corporations owned or controlled by enemies. The doctrine appears to have originated in the English authorities as a convenient characterization of domestic or neutral corporations owned or controlled by German stockholders or directors residing in Germany during World War I. The courts concluded that just as residence in enemy territory determines the enemy character of an individual so, control of a corporation by individuals resident in enemy territory determines the corporation's enemy character whether or not organized in domestic or neutral territory. The Court of Appeal stated the test succinctly in the case of *Re Badische Co. Ltd.* [1921], 2 Ch. D. 331 at 371, as follows:

> "* * * The true test is control, the analogue of that residence which invests an individual residing in an enemy country with enemy character."[3]

The prize cases also utilize the concept of enemy taint of ships or cargo, but not of individuals, through enemy ownership or control of the ships or cargo, in order to justify the condemnation of ships or cargo. *The Buena Ventura,* 175 U. S. 384; *The Wren,* 73 U. S. 582; *The Venus,* 8 Cranch. 251.[4] There is no judicial authority warranting or supporting the extension of the doctrine of enemy taint to individuals.

2. *Legislative history and amendments of the Act.*—In addition to the lack of judicial authority there is nothing in the text, legislative history, or policy of the Act which suggests that the doctrine of enemy taint, devised by the courts to deal with corporations owned or controlled by enemies, should be extended to neutral citizens not resident in enemy territory who are stockholders in enemy tainted corporations. Before the Act's enactment on October 6, 1917, the decision in the *Daimler* case, *supra,* in 1916, determining the enemy status of a domestic corporation by the enemy residence of its directors and stockholders, was

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[3] See also *Daimler Co.* v. *Continental Tyre & Rubber Co.* [1916], 2 A. C. 307; *H. P. Drewry, S. A. R. L.* v. *Onassis,* 266 App. Div. 292, affirmed 291 N. Y. 779; *Fritz Schultz, Jr. Co.* v. *Raimes & Co.,* 100 Misc. 197, 166 N. Y. Supp. 567 (Irving Lehman, *J.*); *Overseas Trust Co., Ltd.* v. *Godfrey* [1940], 177 South African Law Reports, Cape of Good Hope Provincial Division 185; *Re G. Hardt & Co. Pty., Ltd.* [1940], 13 Australian L. J. 167 (1917); Cohn, *German Enemy Property,* International Law Quarterly, Vol. 3, p. 548 (1950).

[4] See also *Part Cargo ex. M. V. Glenroy* v. *Spencer* [1945], A. C. 124; *The Hamborn* [1919], A. C. 993; *The Proton* [1918], A. C. 578; Hackworth, VI *International Law,* 512; Domke, *The Control of Alien Property* (1947), p. 104.

considered but not adopted. *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457, 472.[5] In the Supreme Court's first *Uebersee* decision, hereinafter called *Uebersee I,* it was held that the amendment of §5(b) by the First War Powers Act of December 18, 1941 did in effect adopt the doctrine of enemy taint for foreign corporations owned or controlled by persons residing in enemy territory. Enemy interests in the shares of domestic corporations are controlled by vesting the enemy owned shares rather than the assets of domestic corporations because these shares, in contemplation of law, unlike the shares of foreign corporations, are always present within the United States and subject to the vesting power. *Hamburg American Line T. & N. Co.* v. *United States,* 277 U. S. 138, 140; cf. *City Service Co.* v. *McGrath,* 342 U. S. 330.

a. Section 2(a) stating the statutory definition of "enemies", read together with §2(c), makes it clear that Congress did not intend a new class of individual enemies to be created by the extension of any judicial doctrine of enemy taint to individuals. In §2(c) Congress expressly provided the manner in which the class of statutory enemies defined in §2(a) and (b) might be expanded to include "natives, citizens or subjects of any nation with which the United States is at war other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find that the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term 'enemy'."[6] In World War I President Wilson utilized this authority in his proclamations of February 5 and May 31, 1918 (40 Stat. 1745, 1786) which included within the classes of enemies under the Act special classes of natives, citizens and subjects of enemy nations, including all natives, citizens or subjects of the enemy interned during the war under R. S. 4067 (50 U. S. C. 21).[7] President Roosevelt did not invoke this power in World War II. *Ex Parte Kawato,* 317 U. S. 69, 76. This express provision of a method of expanding the definition of "enemy" for purposes of the Act strongly implies that Congress did not intend that the definition of "enemy" should also be expanded in a manner not provided by Congress, namely, by extension of the doctrine of enemy taint to neutral citizens or natives of Germany, such as intervener.[8] Intervener could be made an enemy under the Act only in the manner Congress provided, that is, by Presidential Proclamation.

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[5] See also hearings on H. R. 4960, 65th Cong., 1st Sess., Part I, p. 96; Senate Report No. 113, 65th Cong., 1st Sess. p. 4.

[6] In addition "ally of enemy," as defined in §2, may be expanded to include "natives, citizens, or subjects of any nation which is an ally of" an enemy nation if the President shall so proclaim.

b. Section 3, making it unlawful for all persons in the United States to trade with an enemy, further reveals the statutory scheme to control persons within the United States during the war, including intervener, by the imposition of criminal sanctions applicable to all persons within the United States and to control enemies outside the United States, that is resident in enemy territory or resident outside the United States and doing business in enemy territory, by vesting their property within the United States. The whole statutory scheme of control is based on the concept that individual persons within the United States, regardless of their nationality, were not to be considered as enemies under the Act unless the President explicitly so proclaimed under the authority of §2(c) of the Act.

c. Various post-war amendments of the Act adhered to the basic concept of enemy by enemy residence in enemy territory even when limited exceptions were made. Section 32 enacted in 1946, recognized that special classes of technical enemies residing in enemy territory deserved the relief of discretionary voluntary return such as German nationals resident in enemy territory who had been persecuted under German law on political, racial or religious grounds. Section 32(a)(2)(E), cited in *Uebersee I* (332 U. S. at p. 490), recognized the doctrine of enemy taint of foreign corporations, which in contemplation of law reside outside the United States, by prohibiting voluntary administrative return to a foreign corporation which at any time *after December 7, 1941* was controlled, or 50% or more of the stock of which was owned, by any person ineligible to receive a voluntary return under §32. No implication can be found in this amendment, however, that Congress in *extending* voluntary administrative return to special classes of enemies also did something quite different and contrary and *restricted* the class of individual claimants eligible to seek return under §9(a). Section 34, in defining the classes of creditors who may file debt claims against vested assets, excludes resident enemy aliens who have been interned in the United States. Thus when Congress wished to make any departure from the concept that enemy status is determined by residence in enemy territory, it expressly so provided. And even §39 enacted in 1948, prohibiting return to any nationals of Germany or Japan, without express reference to residence, was construed as impliedly including the residence concept so that only Japanese or German nationals residing in enemy territory were barred from recovering their vested assets. *Guessefeldt* v. *McGrath, supra.*

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[7] The text of these proclamations is conveniently reproduced in the historical note to 50 U. S. C. A. App. §2 (1928 Ed.) and are referred to in *Hughes* v. *Techt,* 188 App. Div. 743, 177 N. Y. Supp. 420, affirmed 229 N. Y. 222, cert. den. 254 U. S. 643.

[8] For other purposes, under different statutes, such as internment, Congress did include within the term "enemy" natives of enemy countries even though naturalized in neutral or friendly countries (50 U. S. C. 21). It was under this provision that intervener, a citizen of Liechtenstein but a native of Germany, that is born in Germany, was interned.

Thus there is no evidence whatever of Congressional intent to expand the statutory definition of "enemy" in §2 to include neutral citizens not resident in enemy territory on the basis of some undefined theory of individual enemy taint. Such legislation of a confiscatory and penal character will not be extended by implication in the absence of a clearly expressed Congressional intent. *Guesse-*

feldt v. *McGrath, supra; The Buena Ventura, supra; The Wren, supra.* On the contrary, the Courts have been careful to adopt the narrower of alternative constructions in defining the meaning of "enemy" under the Act. *Kaufman* v. *Societé Internationale, supra; Zander* v. *McGrath, supra.*

d. Further evidence that Congress did not intend to extend the definition of "enemy" to individuals by any doctrine of enemy taint is found in the weighty consideration that if intervener is an enemy under the Act by enemy taint, he is not only ineligible to recover his proportionate share of the vested property here involved but also inescapably he is an enemy for all purposes under the Act. Section 2 provides: "The word 'enemy', as used herein shall be deemed to mean, for the purposes of such trading and of this Act—" and the definitions in respect of residence in enemy territory and doing business within enemy territory then follow. Congress thus provided that an enemy for any purpose under the Act is an enemy for all purposes under the Act and the Act has always been so administered whether the question has been the return of vested property (§9), eligibility to sue in the courts (§7), or trading with the enemy (§3). If individuals are enemies by enemy taint the following consequences ensue which surely were never intended by Congress:

(i) An individual so tainted, such as intervener neutral citizen present all during the war in the United States, would be, as an enemy, denied access to our courts entirely as were resident alien enemy internees in Warld War I pursuant to the Presidential Proclamation under §2(c) of the Act. Cf. *Ex Parte Kawato, supra; Hughes* v. *Techt, supra; Arndt-Ober* v. *Metropolitan Opera Co.,* 102 Misc. 320, 169 N. Y. S. 304, mod. 182 App. Div. 513, 169 N. Y. S. 944; *Kaufman* v. *Isenberg,* 177 Misc. 939, 32 N. Y. S. 2d 450; *Tortoriello* v. *Seghorn,* 103 Atl. 393 (N. J.). Surely Congress did not intend that natives of Germany who had become neutral citizens and had entered the United States prior to our entry into the war were to be treated as enemies and denied access to the courts in the absence of Presidential Proclamation to that effect. On the contrary it has been held that such persons in the United States have access to our courts. *Ex parte Kawato, supra.* If these persons are not enemies in this respect they cannot be enemies in respect of vested property.

(ii) If individuals such as intervener may be enemies by taint it was unlawful under §3 for any persons to trade with them. *United States* v. *Leiner,* 143 F. 2d 298 (C. A. 2); *United States* v. *Krepper,* 159 F. 2d 958 (C. A. 3). Surely Congress did not intend to bar trade with an undefined and undefinable class of individuals who could be determined to be enemies not by a statutory definition or Presidential Proclamation but only by judicial adjudication of enemy taint. Congress in §2(c) placed upon the President the responsibility of designating classes of individuals in the United States to be treated as enemies under the Act, and the failure of the President to do so in World War II rules out the application of enemy taint to individuals.

3. *Practical Considerations.*—Any judicial extension of the statutory definition of individual enemies to include some undefined and undefinable class of enemy tainted individuals, in the absence of a legislative definition or standard of enemy taint, would involve the confusion of varying judicial standards and the uncertainties of judicial legislation in a field where a Congressional standard is an imperative prerequisite. The absence of any statutory provision or judicial decisions designating individuals as enemies by a doctrine of taint is not accidental but understandable. The courts can deal with taint of a neutral corporation by application of judicially known standards of "ownership" and "control" of a corporation, but where an individual is concerned what standards are available to adjust his enemy taint?

a. If it is a question of the degree of enemy sympathies after the commencement of war interdicts all intercourse with the enemy, how will the courts measure the degree of sympathy which constitutes taint? Surely in our courts it cannot be a question of family relationship to persons resident in enemy territory. If it could be a question of sympathy or activities prior to the commencement of war which creates the enemy status, how is the culpability of actions and sympathies, innocent when committed and entertained before there was an enemy, to be measured and how far back before the commencement of the war are the courts to go in exploring and weighing the actions and thoughts and sympathies of the individual subsequently stigmatized as an enemy by enemy taint? Section 32(a)(2)(E), making December 7, 1941 the crucial date for enemy ownership or control of a foreign corporation, strongly implies that prior conduct is not relevant to enemy taint. These considerations argue for a judicial determination that in the absence of a legislative standard individuals, unlike corporations, will not be ruled to be alien enemies and their property forfeited by the application of any doctrine of taint.

b. If enemy taint is to be extended beyond corporations to individuals are they to be considered as tainted only in respect of their shares in a tainted corporation or in respect of their other property in the United States also? The Act does not recognize enemy status for one purpose or one piece of vested property under the Act and not for other purposes or other property under the Act. If a neutral citizen stockholder is denied recovery of his proportionate share of the vested property of the Swiss corporation involved in the *Kaufman* case because of alleged German sympathies or alleged connection with the alleged enemy control of the corporation, is he also to be denied recovery of any other vested property he owned individually in the United States and not through an enemy tainted foreign corporation? If activities and sympathies, not connected with the enemy tainted corporation, are relevant to the determination of an individual stockholder's taint why should they not also taint his property not owned through the tainted corporation? It is difficult to believe that Congress tacitly intended to authorize such far reaching consequences to all the property in the United States of a neutral citizen because of his ownership of stock in, and enemy tainted relationship to, a tainted foreign corporation. But such a result seems unavoidable if a stockholder is to be classified an enemy under the Act by "taint."

Intervener recognizes the force of the policy considerations which have led the Supreme Court to construe the various sections of the Act harmoniously as a rational whole to accommodate the various provisions of §§2, 5, 9 and 39. This result was fully accomplished in *Uebersee II* and in the *Kaufman* decision. But there is a limit to such judicial construction of a statute which has received considerable studied attention from Congress in the post-war years long after the possibly hasty original enactments and amendments shortly after the beginning of World War I and also the beginning of World War II. In the absence of explicit Congressional provision the Court should not go further and deny an individual citizen of a neutral country, never present in enemy territory during the war, his share of the vested assets of the tainted foreign corporation. The purpose of the Act is fully accomplished by the original seizure of all the assets and by post-war retention of that share of the assets attributable to the enemy interest in the corporation. It is not necessary for the purposes of the Act also to confiscate the interests of the neutral citizen stockholder. If this is to be done it should be done expressly by Congress and not by the courts. In this case the Act is completely satisfied by the Custodian, in place of the usufructuary, retaining possession of the vested assets for the life of the surviving usufructuary and then returning the property, less possibly 80% of the income, or retention by the Custodian of that part of the property which represents the usufructuary's right to receive 80% of the income for her lifetime.

It might be suggested that some of these difficulties can be avoided by a ruling that not the claimant stockholder but rather his corporate shares are enemy tainted by the enemy interest therein and that no such stockholder, citizen or friendly alien, may recover the proportionate share of the vested assets represented by such shares. The short but complete answer to this contention is that the scheme of the statute is not to classify property as enemy property but rather to determine which individuals or corporations are enemies and which individuals or corporations are not enemies and eligible to recover vested property. Certainly if intervener was an American citizen it would not be contended that he could not recover his share of the vested property because of the enemy interest in plaintiff corporation's shares. The Court below has made it clear that the interests are severable. Consequently the case must turn on the resolution of the legal question whether the intervener, a neutral citizen never in enemy territory during the war but in the United States from 1940 to 1950, can be denied recovery on the ground that he is an enemy not by statutory definition or Presidential proclamation but only by enemy taint because his German parents retained a life interest in a gift which they gave him in 1931. The intervener submits that Congress intended no such result.

4. *Construction to Avoid Constitutional Questions.*—Extension of the statutory term "enemy" to include individuals by some undefined enemy taint, authorizing confiscation of their property, raises serious questions under the First and Fifth Amendments which the courts will avoid when there is available the narrower construction restricting application of the enemy taint doctrine to neutral corporations owned or controlled by enemies. *Guessefeldt* v. *McGrath, supra; Uebersee Finanz-Korporation* v. *Markham,* 81 App. D. C. 284, 158 F. 2d 313, 315. If a neutral

citizen person in the United States before and during the war may be enemy tainted and his property confiscated because of some prewar expression of sympathies for his native country which subsequently becomes an enemy, the absolute guarantee of freedom of speech under the First Amendment is violated (*United States* v. *Ballard,* 322 U. S. 78, 86; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Cantwell* v. *Connecticut,* 310 U. S. 296, 301-304). If such a neutral citizen is to be held to be enemy tainted on the basis of expressions or feelings there is denial of due process of law and a taking of property in violation of the Fifth Amendment. It is submitted that these grave and complex constitutional issues should be avoided by holding that individuals not resident in enemy territory are not enemies by enemy taint and such individuals under the Act may recover their proportionate share of the vested property of a neutral corporation enemy tainted by reason of ownership or control by enemies.

B. On the Facts Intervener Is an Innocent Stockholder

Even if under a proper set of facts enemy taint may be applied to an individual neutral citizen, present in the United States and not in enemy territory all during the war, nevertheless the facts here do not warrant classifying the intervener as enemy tainted. If the courts do extend enemy taint to neutral citizen stockholders of tainted neutral corporations, the intervener submits that the facts establishing taint should be restricted to conduct after the United States became a belligerent and to such conduct inimical to the United States in relation to the tainted corporation and should not extend to conduct prior to December 7, 1941 or to the stockholder's interest in the welfare of or sympathy for the people of an enemy country where he was born which is not related to his stockholding in a tainted corporation. It will be noted that §32(a)(2)(E) of the Act, the only statutory provision incorporating the doctrine of enemy taint of neutral corporations, is limited to foreign corporations owned or controlled by enemies *"at any time after December 7, 1941,* * * *" (emphasis supplied).

The Court below, however, in both its opinion and its findings refers to and relies upon intervener's conduct in Europe long before December 7, 1941, or even before the war began in Europe on September 1, 1939, which has no relation to plaintiff corporation. In the second part of its opinion, devoted to enemy taint, the Court below states that the intervener's enemy taint consists of the following several elements: (1) holding his interest in plaintiff corporation subordinate to and on behalf of his parents (R. 46a-48a); (2) acting for his father in his business affairs in Germany before September 1, 1939 (R. 48a-49a); (3) negotiations and cooperation with the German government before 1941 in respect of (a) his change of citizenship from German to Liechtenstein in November 1939 (R. 49a-51a); (b) suggestion of the name of a Swiss banker who might cooperate with the German government (R. 52a); (c) bauxite production in Hungary (R. 52a), and (d) response to a communication of the Commercial Attache of the German Consulate in February 1941 (R. 52a-53a). The Court rejected the uncontradicted evidence of the intervener's contribution to the United States defense and war effort beginning in 1941 and continuing after December 7, 1941 and after he was interned (R. 53a-54a), and concluded that his prewar activities constitute enemy taint (R. 54a).

1. *Intervener's subordinate interest in plaintiff corporation.*—The Court below held that under *res judicata* intervener was bound by the prior determinations that his interest as owner of plaintiff corporation's shares was "subordinate" and that usufructuary interest was paramount and controlling and that, except for the vesting, through him the enemy nationals would be able to receive the benefits of the property and that since he holds his interest primarily "on behalf of" and for the benefit of his parents his own interest is enemy tainted (R. 46a-48a).

The intervener's contention that he was not bound by the prior determinations of the property interests of himself and his parents under German law and was entitled to a trial *de novo* on these questions, and that these interests in Swiss shares is governed by Swiss law, is set forth *infra,* p. 75. The intervener also contends as a matter of law that if he is bound by the prior determinations that as a stockholder he did not control the plaintiff corporation but held merely a subordinate interest in plaintiff corporation's shares, the mere holding of that subordinate and passive interest cannot constitute enemy taint in the absence of evidence and findings that intervener after December 7, 1941 engaged in activities to promote the interests of the usufructuaries in the property. The Court should not on the one hand deny plaintiff corporation any recovery on the ground that its non-enemy stockholder has a subordinate and passive interest in its shares and that the enemy usufructuary interest is dominant and paramount and then, on the other hand, deny the stockholder any recovery of his subordinate and passive interest on the ground that this interest exists in and is associated with the usufructuary interest in plaintiff corporation's shares. Surely enemy taint of an individual cannot be established by mere ownership of interest in property in which there is also an enemy interest where no utilization of that ownership on behalf of the enemy interest after December 7, 1941 is proved or found. The purposes of the Act are entirely achieved by vesting all of the property of the tainted corporation and retaining the enemy interest therein without in addition confiscating the non-enemy interest on the insubstantial ground that it is associated with an emeny interest in the same corporation. This becomes clearer when it is considered that the enemy usufruct was not established by intervener.

The reservation of a usufruct in the gift agreement of October 5, 1931 was opposed by intervener but was insisted upon by his father who feared that in an inflation in Germany similar to that which followed World War I he might be penniless (R. 238a). It was natural that after the sale of Adam Opel, A.G., in which intervener had a prominent place in the management, to General Motors in 1929 his parents wished to make the financial provision for him provided in the gift (R. 63a). Intervener accepted the gift with the conditions of a usufruct which his parents placed upon it and invested the proceeds in the shares of United States corporations in reliance upon both the economic and legal stability of investments in the United States. Certainly no taint or censure can be fastened upon him because in 1931 his parents chose to reserve a life interest in the property which upon the outbreak of war many years later became an enemy interest.

It should be significant that the usufruct was never concealed but, on the contrary, was asserted in litigation between plaintiff corporation and the Government long before the war. The intervener in an affidavit in 1935 in the so-called *Gold* case (Fdgs. 47-50, R. 68a-69a) set forth that his parents had a usufruct in the shares of plaintiff corporation. *Uebersee Finanz-Korporation* v. *Rosen,* 83 F. 2d 225 (C. A. 2), cert. den. 298 U. S. 679.[9] Between September 1, 1939 and December 7, 1941 no effort was made to conceal or alter the usufruct in contemplation of war with the United States.[10] The Act does not forbid sale of assets to neutrals or other persons prior to but in contemplation of war. *Standard Oil Co.* v. *Clark,* 163 F. 2d 917 (C. A. 2), cert. den. 333 U. S. 873.[11]

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[9] In the *Gold* case plaintiff corporation had been refused a Treasury license to export from the United States to Switzerland gold coins purchased in February 1933 before the Act of March 9, 1933 and the executive orders thereunder made it unlawful either to retain or to export gold without a license. The plaintiff corporation asserted that the statute and regulations did not apply to it, a corporation not present or doing business in the United States. In answer to the Government's contention that plaintiff's stockholder, the intervener, was present from time to time in the United States it was emphasized that the corporation's shares were held in Switzerland subject to a usufruct of the Opel parents who were not at any relevant time in the United States. The facts were fully set forth in the record on appeal in that case (Defendant's Exhibit 8 on the former appeal herein). The Courts did not have to consider this question because they decided that the statute and executive orders controlled all gold in the United States whether or not the owners were in the United States.

[10] The plaintiff corporation's contentions that prior to 1939 the usufruct *in rem* had not been established because of intervener's separate access to the shares in his safe deposit box and lack of the necessary copossession of the shares by the usufructuaries, and if established had been lost when the shares were sold subject to repurchase, and also had been waived, were not accepted.

The proceeds of the gift were transferred to plaintiff Swiss corporation, in part as a loan (R. 839a, 883a, 903a) and in part in exchange for all of its 100 bearer shares issued to intervener and three of these shares were held as qualifying shares in the names of three Swiss citizens who in 1932 were elected members of the Administrative Council or Board of Directors of plaintiff Swiss corporation (Fdg. 75, R. 76a). The proceeds were then invested principally in the majority of the common stock of Spur Distributing Co. and Harvard Brewing Co., two Delaware corporations. The American management of these two companies was continued by plaintiff corporation and intervener, and also after vesting, by the defendant who apparently was entirely satisfied with the loyalty and reliability of their American managements.[12]

The Court below found upon the first trial that Wilhelm von Opel's agent controlled plaintiff corporation until 1940 and in the absence of evidence inferred that this control continued thereafter (Fdg. 40, R. 66a-67a). The Court in its opinion upon the second trial, but not in its findings, added that in view of the paramount and controlling usufructuary interest intervener held his interest primarily for the benefit of the usufructuaries and therefore it is tainted and may not be recovered (R. 46a-48a). Thus the plaintiff corporation's claim was first rejected on the ground that intervener stockholder was not in control, and now intervener's claim is rejected because his interest is subordinate and passive.

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[11] Contrast the facts in the wholly different cases in which enemy interests in property have been concealed or in which the enemy has made a transfer of property in contemplation of seizure. *Beck* v. *Clark,* 182 F. 2d 315 (C. A. 2); *Standard Oil Co.* v. *Clark,* 163 F. 2d 917 (C. A. 2), cert. den. 333 U. S. 873; *Kaneme Fujino* v. *Clark,* 172 F. 2d 384 (C. A. 9), cert. den. 337 U. S. 973; *American Transatlantic Co.* v. *United States,* 83 F. Supp. 832 (Ct. Cl.); *Draeger Shipping Co.* v. *Crowley,* 55 F. Supp. 906 (S. D. N. Y.).

[12] In respect of the American management of Harvard Brewing Co. the defendant's predecessor stated: "The Custodian announced the vesting of the stock was not to be considered a reflection of the management then in charge of the company and that he need not alter its normal business operations." *Annual Report Office of Alien Property for the Fiscal Year Ending June 30, 1945,* p. 89.

The decision of the Court below restricts an innocent stockholder under the *Kaufman* decision to an innocent investor "in an ostensibly neutral corporation, with interests hostile to the dominant enemy management, without knowledge the assets in his name were contributing to the resources of enemy nationals" (R. 47a). There is no basis in the *Kaufman* opinion for these qualifications of hostility to the dominant enemy management and lack of knowledge of the enemy interest which are wholly unrealistic when it is considered that normally, if not always, the investment will have been made before there is an enemy who is created only when the United States is at war. If an American stockholder invests in a Swiss corporation prior to war between Germany and the United States the knowledge that there are German interests in the corporation, or even German management, should not make his interest tainted because subsequently the United States and Germany are at war. The innocent stockholder's interest is hostile to the enemy management only after hostilities commence. If "innocent" is to have any moral or political connotation, or even any meaning at all, it surely cannot include penalizing the stockholder for not foreseeing which countries may or may not become enemies in a future war.

But even applying some such test as that suggested by the Court below, tainting before the war an investor in a Swiss corporation known by him to be under German management, the intervener is not tainted where, as here, the usufructuary interest was originally reserved in the gift in 1931 and was not a voluntary investment by intervener and was never concealed. There is no substantial distinction, warranting confiscation, between Kaufman, not resident in Germany and not controlling Interhandel, and intervener, not resident in Germany and whom the Government has insisted and the Courts have found did not exercise control over plaintiff corporation. He holds his interest subject to the enemy usufruct just as Kaufman holds his minority interest subject to the alleged enemy management of Interhandel.

The suggestion in the opinion that except for vesting enemy nationals could claim the benefits of the vested property (R. 46a-47a) is readily answered by the considerations that the vesting prevents this result without the necessity of confiscating intervener's interest in the property. Even without vesting the Act forbade intervener in the United States to trade with the enemy, including his parents, and to give them after the war commenced benefits which they had not even sought prior to the war (Fdg. 53, R. 70a).

2. *Intervener's activities as "alleged agent of the enemy and enemy nationals"* (R. 48a).—The Court devoted several pages of its opinion (R. 48a-54a) to reviewing intervener's business activities in Germany on behalf of his father before September 1, 1939, his arrangements to change his citizenship from German to Liechtenstein and his communications with the German Consulate in New York City in 1941. His activities on behalf of the American defense effort prior to December 7, 1941 and the American war effort after December 7, 1941, are dismissed with a brief statement that the record fails to support his contention that he contributed to the war effort (R. 53a-54a). The intervener contends that these activities before December 7, 1941 can have no bearing on the question of enemy taint but since they are relied upon by the Court below brief reference is made to them here. Indeed, although the Court below makes extended reference to these activities prior to December 7, 1941, it appears to concede their irrelevance in the statement "the critical date for determining whether

property is enemy-held is the date of declaration of war" (R. 58a).

(a) *Intervener's business activities on behalf of his father.*—Both the opinion (R. 48a-49a) and the findings (Fdgs. 76-78, R. 76a-79a) recite the activities of intervener between 1934 and 1939 assisting his father in his business investments during intervener's visits to Germany which the Court found averaged about 10% of the time (Fdg. 6, R. 60a). The Court relied upon these activities as indicating intervener's enemy taint as an agent of enemy nationals. But not until years after the termination of this period were his parents enemy nationals and it is submitted, without extended argument, that it is plainly erroneous to give these activities any weight whatever in considering the question of intervener's enemy taint as a stockholder of plaintiff corporation.

(b) *Intervener's change of citizenship.*—The Court in its opinion (R. 49a-51a) and findings (Fdgs. 88-94, R. 79a-82a) also states that enemy taint is to be found in intervener's discussions with representatives of the German Government after September 1, 1939 in connection with his abandonment of German citizenship and acquisition of Liechtenstein citizenship. When the war commenced in Europe on September 1, 1939 intervener, who had served as a soldier in World War I and was then forty years of age, refused to obey the summons he received in Switzerland to enter the German armed forces (R. 218a). Instead he immediately began steps to drop his German citizenship, even while Germany was at war, and acquire another citizenship. He did not have the required residence for Swiss citizenship (R. 220a) and therefore proceeded to acquire Liechtenstein citizenship. This certainly was not activity on behalf of, or loyalty to, the Nazi Government of Germany. His explanation is entirely credible that he feared capture and severe punishment, even death, by the then German authorities if Switzerland were invaded or if he were caught going to the United States through German dominated Italy or France which it was necessary for him to cross from land locked Switzerland to reach a port to embark for the United States. It was for this reason that he communicated with von Bibra at the German Legation in Bern concerning abandonment of German citizenship while Germany was at war and give some explanation which might satisfy the German government so that he would be safe from apprehension by the German authorities (R. 221a). Changing citizenship was not cloaking or concealing an enemy interest but a perfectly valid method of preventing vesting of his interest in American properties in the event that Germany and the United States became enemies. At the first trial it was held that his Liechtenstein citizenship was lawful and his German citizenship was terminated on November 21, 1939 (R. 60a-61a). Even if it had not been terminated and he had been a dual German and Liechtenstein citizen the fact that he was not resident at any time during the war in Germany would have entitled him to recovery of any of his property which was vested. *Guessefeldt* v. *McGrath, supra.* It is submitted that enemy taint cannot be based upon dropping his German citizenship.

The fact that in September 1939, at von Bibra's request, intervener suggested the name of a Swiss banker friendly to Germany, over two years before the United States entered the war, certainly is no basis for confiscating his property.

(c) *Intervener's activities in bauxite production.*—The Court holds that although plaintiff corporation did not do business in Hungary through ownership of its subsidiary Transdanubia Bauxite, A.G. nevertheless intervener, plaintiff corporation's stockholder, did do business in Hungary after December 13, 1941 because in 1939 upon request he renewed undefined powers of attorney to plaintiff corporation's Budapest lawyer to act "on behalf of Uebersee Finanz-Korporation" (Fdg. 69, R. 74a-75a). The facts are discussed in greater detail under Point II, *infra,* p. 55. The intervener submits that his activities in respect of bauxite production in Hungary before he came to the United States in 1940, and long before December 13, 1941, do not constitute enemy taint and that the powers of attorney to act for Uebersee constitute neither doing business nor enemy taint. If these activities are not sufficient to constitute doing business making intervener an enemy under §2(a) of the Act, they are not sufficient to make him an enemy tainted under §2 of the Act. Intervener can be characterized as an enemy only if he is brought within §2. As a matter of statutory construction the same conduct which does not make him an enemy by way of doing business cannot make him an enemy by way of enemy taint.

(d) *Negotiations with the German Consulate.*—In February 1941 intervener was advised by the Commercial Attache of the German Consulate in New York of a telegram from his father requesting intervener to negotiate with General Motors about possible repurchase of the shares of Adam Opel, A.G., and intervener spoke to the General Counsel of General Motors. Intervener advised the Commercial Attache that in view of impaired German-American relations and the registration requirements for foreign agents, he had decided to withdraw from even social contacts with industrialists, especially representatives of General Motors, and that it would not be easy to accept his father's proposal. It is clear that this matter was thrust upon the intervener who did not wish it but no doubt was concerned for his father's safety in Germany. His conversation with the General Counsel for General Motors was not followed up and nothing came of the matter. This episode, almost a year before war between Germany and the United States, supplies no evidence of enemy taint.

3. *Intervener's activities in the United States.*—The Court below in both its opinion (R. 53a-54a) and in its findings (Fdgs. 98, R. 83a) summarily dismissed intervener's uncontradicted evidence that prior to his internment as a native of Germany he contributed to the defense effort and the war effort of the United States, and after his internment he supplied information deemed useful by the Military Intelligence authorities.[13] Erwin G. Schattmann testified that beginning in 1940 Ergo Machine Works, Inc., wholly owned by plaintiff corporation indirectly, began to do defense work exclusively under intervener's direction, including the manufacture of aircraft and torpedo parts, and developed a valuable patented machine for hot pressing non-ferrous metals to the full satisfaction of the representatives of the Office of Production Management who approved the necessary material priorities for the work (R. 157a-161a). In addition intervener obtained a patent on a fastener for airplane cowlings which was successfully tested at Wright Feld (R. 236a). Colonel Mettler, an experienced ordnance officer in charge of the Military Intelligence office at Miami, Florida, testified that intervener "has given upwards of fifty excellent reports on German situations and German conditions and that he continues to be an excellent source of information on Germany" (R. 184a). Although the Court recognized in its opinion that the declaration of war determines enemy status (R. 58a) it entirely ignored this unambiguous activity in the interests of the United States and against the interests of Germany after the war commenced and instead relied upon entirely innocent business activities long before the United States and Germany were at war. It is submitted that if in addition to a stockholder's activities in respect of the shares

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[13] The Alien Enemy Act of 1798 (50 U. S. C. 21) provides for internment not only of enemy nationals but also natives of enemy countries and internment of able bodied persons, formerly members of the German armed forces in World War I, such as intervener, was done as a precautionary measure without necessarily implying that any particular individual was hostile or dangerous to the United States. Senate Report No. 1515, 81st Cong., 1st Sess., p. 407.

of the tainted corporation or the vested property, which he seeks to recover, his general activities in respect of the belligerent nations are relevant surely his pre-war activities should not be emphasized and his activities after the commencement of the war ignored, as they were by the Court below.

4. *Intervener's sympathies.*—The Court stated in its opinion that intervener's attachments and sympathies did not constitute enemy taint but were considered only as bearing on his activities and residence (R. 54a). But the Court in its qualified finding that intervener was not a vigorous supporter of the National Socialist regime in Germany insofar as it conflicted with his financial investments and personal safety (Fdg. 64, R. 73a), ignores significant undisputed facts which are much more reliable in determining intervener's sympathies in a difficult political situation, due to the fact that his parents continued to reside in Germany, than ambiguous circumstances relied upon by the Court such as that intervener was friendly socially with persons prominent in the German government. Intervener's true sympathies are determined by his conduct rather than by statements attributed to him by biased and interested witnesses at the former trial. In 1929 intervener abandoned his residence in Germany and never resided there under the Nazi regime and spent only 10% of his time there although his parents resided there and he had responsibilities in respect of his father's large financial investments in Germany. He endeavored strenuously to get assets out of Germany contrary to the government's policies (R. 204a). He openly included very prominent anti-Nazis among his close personal friends (R. 187a, 216a). When Germany invaded Poland he refused to obey a mobilization order served on him in Switzerland as a German citizen and dropped his German citizenship and came to the United States and engaged in direct defensive war work for the United States until he was interned. And then, while interned, he gave valuable information to the Military Intel-

ligence authorities (R. 184a). In addition to this incontestable and unambiguous conduct a number of witnesses testified that he hated the Nazis. The trial Court chose to ignore this unambiguous conduct and instead relied for enemy sympathies on such obviously ambiguous conduct as intervener's consultations with von Bibra in connection with his abandonment of German citizenship, or the fact that a man in his financial position was friendly with German officials. His position and that of his parents obviously forced him into some relations with German government officials but his choice and not circumstances caused him to work for the United States during the war. This conduct can be fairly explained only in terms of a deliberate choice, not easy for a native of Germany with parents living there, to abandon his German citizenship and work against Nazi Germany. This conduct, which continued after December 7, 1941, instead of being ignored should be considered as strong evidence against enemy taint.

II.

On and after December 13, 1941 intervener was not resident outside the United States doing business in Hungary.

In addition to finding intervener an enemy under §2 by enemy taint, the Court below determined that he was also a statutory technical enemy under §2(a) as a "resident outside the United States, and doing business within" Hungary. Intervener protested (A) that this issue was outside the issues determined at pretrial to be tried and that on the merits intervener was (B) neither resident outside the United States nor (C) doing business in Hungary on or after December 13, 1941. If intervener is held on this appeal to be an enemy by enemy taint it is not necessary to decide this additional ground of enemy status for purposes of this case, but since intervener has a separate action pending[14] to recover vested property owned by him individually it is imperative in order to protect intervener's rights that this Court determine (1) that this issue was not within the issues to be tried, or (2) that on the merits intervener was not an enemy on this ground, or (3) that it is not necessary to pass on the issue and that the determination below should not be *res judicata* against a trial of the issue in intervener's separate action.

A. It Was Reversible Error to Try and Determine the Issue of Intervener's Alleged Residence Outside the United States and Doing Business in Hungary.

When defendant first offered evidence on this issue intervener's counsel asserted that they were in fact surprised and that the issue was outside the issues fixed at pretrial (R. 308a). The Court below reserved its ruling and in its opinion after trial ruled that this issue was within the pretrial (R. 54a) and made findings thereon although intervener requested that the Court's determination be limited to the principal question of enemy taint. Intervener's counsel were genuinely surprised by the introduction of this issue in defendant's trial memorandum on the opening of the trial and earnestly submit that a perusal of the pretrial steps discloses that the intervener did not know and could not know that this question was being raised by the defendant. The following steps occurred prior to the trial:

1. On the first trial the defendant contended (a) that the gift was a sham transaction and void; (b) that if valid the gift reserved an enemy usufruct, and (C) that in any event plaintiff corporation did business in Hungary and therefore had independent enemy status apart from the usufruct in its shares (82 F. Supp. 602).[15] The trial

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[14] *Fritz von Opel* v. *Brownell*, Civ. No. 50-70 (S. D. N. Y.) and a similar action in the court below.

[15] The trial Court's opinion on the first trial does not refer to defendant's additional contentions that intervener was a German national barred from recovery under §39 and was an agent of the German Government after December 7, 1941.

Court's opinion stated that plaintiff corporation's ownership of an Hungarian subsidiary shipping bauxite to Germany was some further evidence of enemy taint and thus in effect rejected the contention that plaintiff corporation did business in Hungary. 82 F. Supp. at p. 606. Similarly, the Court's reference to intervener's German sympathies as additional evidence of enemy taint involved a rejection of the defendant's contention that the intervener was a statutory enemy as an agent of an enemy government under §2(b) of the Act. It is against this background refusing to find that the plaintiff corporation did business in Hungary or that intervener was an agent of an enemy government that the pretrial on the second trial should be considered.

2. The intervener's and defendant's pretrial memoranda submitted pursuant to pretrial Rule 16 in connection with pretrial scheduled for November 16, 1953 (R. 10a-20a), make no reference to any contention that intervener, plaintiff corporation's stockholder, was doing business in Hungary. Such a contention would have been surprising to intervener's counsel in view of the trial Court's former refusal to find that plaintiff corporation was doing business in Hungary. Intervener's pretrial memorandum stated without challenge by defendant that intervener "is *admittedly,* since prior to December 6, 1941, a citizen of Liechtenstein who was not at any time relevant to this action either a resident of, or person in, enemy territory or enemy-occupied territory, or doing business within such territory." (R. 12a, emphasis supplied.) It is true that defendant's memorandum states *generally* that the second question is "(2) Whether Fritz von Opel is innocent of enemy status or enemy taint," but the memorandum goes on to explain (R. 19a):

> "As to the second question, that of Fritz von Opel's eligibility to recover in this action, defendant contends that he is not an innocent stockholder within the meaning of the Supreme Court's decision in *Kaufman,* and that he is enemy tainted and that he is therefore an

> enemy under the Trading with the Enemy Act and ineligible to recover in this action."

It is submitted that if pretrial is to be given its ordinary function of fairly apprising the parties of the issues, any fair reading of defendant's contentions against the background of the case, and the issues already decided at the first trial, does not support the view that intervener's enemy status on any possible statutory ground rather than on the limited ground of enemy taint was in issue.

3. In support of the ruling on this procedural point, the trial Court stated in its opinion that intervener "contended" in his pretrial memorandum that he was not doing business in Hungary (R. 54a). It is submitted that the trial Court plainly misconstrued as one of intervener's contentions to be proved on the trial the statement in intervener's pretrial memorandum, quoted above, *eliminating* intervener's doing business in Hungary as an issue in the case by the unchallenged statement that *admittedly* intervener was not doing business in Hungary.

4. The trial Court in support of its ruling also states that defendant's pretrial memorandum and the Court's pretrial opinion of May 28, 1954 on *res judicata* state the question to be "whether Fritz von Opel is innocent of enemy status or enemy taint. * * *" (R. 54a). But all the pretrial opinion states in this respect is that one of the principal issues is "whether intervener was an enemy or ally of an enemy" (R. 24a) and then immediately goes on to rule that additional factual information would be received on the trial in respect of (1) intervener's acquisition of Liechtenstein citizenship; (2) completion of the naturalization process, and (3) loss of German nationality; and also evidence of intervener's activities, associations and sympathies and ties to his native country, Germany (R. 25a). No mention whatever is made of intervener's doing business in Hungary as an issue.

5. The trial Court also supports its ruling by stating that intervener should have known that the full range of his business activities within enemy territory would be explored (R. 54a). The intervener was entirely aware that the full range of his activities would be explored on the question of enemy taint, but not on the question of doing business in Hungary, and it is submitted that the evidence (considered *infra,* p. 55) by no means was sufficient to place intervener or his counsel on notice that this additional issue was in the case.

6. Upon the opening of the trial intervener's counsel were totally unaware of this issue and intervener's trial brief made no reference to it. But defendant's trial brief did, and upon the first offer of evidence on this issue intervener raised the question whether the evidence was being offered on the issue of enemy taint or on the separate issue of intervener's doing business in Hungary (R. 308a-312a). No objection was offered to the admission of the evidence on the issue of enemy taint and the trial Court reserved the ruling on the objection to the admission of the evidence on the issue of intervener's doing business in Hungary and ruled adversely to intervener only in its opinion after trial.

7. Introduction of this issue for the first time on the trial, despite the voluminous pretrial motions and decisions, pretrial memoranda, and pretrial procedure, was most prejudicial to intervener who had no opportunity to meet the defendant's new contention either by attempting to obtain from Hungary some evidence of the extent of the powers of attorney relied upon by defendant or of any action taken thereunder after December 13, 1941 or even some evidence of Swiss or Hungarian law in respect of the continued validity of such powers of attorney.

8. Intervener did not have the opportunity to prepare to prove fully that in any real sense intervener was a resident of the United States from 1940 to 1950 and was not "resi-

dent outside the United States," which was required under §2(a) to make him an enemy. Indeed, until the Court's opinion after trial intervener had no real opportunity to deal with this issue. The trial Court's decision on this issue if allowed to stand could have grave consequences to intervener apart from this case because it may bar recovery of other vested property individually owned by him which as a person not resident in enemy territory he is eligible to recover under the *Guessefeldt* decision. It is submitted that intervener should be granted a new trial on this issue or, at least, the Court should expressly not place its decision on this ground and should rule that the decision on this issue in the Court below shall not be *res judicata* in any action by intervener to recover other vested property owned by him.

The rule is well established that under Rule 16 only the issues enumerated at pretrial may be tried. *Fowler* v. *Crown-Zellerbach Corp.*, 163 F. 2d 773 (C. A. 9); *McCarthy* v. *Lerner Stores Corp.*, 9 F. R. D. 31 (D. C. D. C.); 3 Moore's *Federal Practice* (2nd Ed.) 1127, 1130; Nims, *Pretrial*, p. 164; Bolitha J. Laws, *Pretrial Procedures*, 1 F. R. D. 397, 399.

B. Intervener Was Not "Resident Outside the United States" Within the Meaning of Section 2(a) of the Act.

The trial Court states in its opinion that intervener was not resident in the United States (R. 41a) and was resident outside the United States (R. 44a). The findings state that intervener was not a resident of the United States (Fdg. 63, R. 73a) but do not find expressly that he was resident outside the United States. Neither in the opinion nor the findings, however (Fdgs. 57-63, R. 72a-73a), does the Court state where intervener was resident outside the United States. The intervener maintains that as a matter of law, and even under the facts as found, intervener was not "resident outside the United States." The intervener urges that a determination of enemy status under the statute requires proof and a finding of residence at some stated place outside the United States, and that in the absence of such a finding and in view of his conceded presence in the United States uninterruptedly from 1940 to 1951, it was erroneously concluded that he was "resident outside the United States" for purposes of §2(a).

The phrase "resident within" enemy territory in §2(a) of the Act is authoritatively construed in *Guessefeldt* v. *McGrath, supra,* but not the phrase in the same sentence of the statute which reads "resident outside the United States and doing business within" enemy territory. The decisions disclose a judicial reluctance to rule that even presence in enemy territory all during the war constitutes "residence" within the meaning of the Act in the absence of clear proof of something more than such presence to constitute residence because the consequence is ineligibility to recover vested private property. *Guessefeldt* v. *McGrath, supra;* see also *Kaku Nagano* v. *Brownell,* 187 F. 2d 759 (C. A. 7), aff'd 342 U. S. 916, on remand 212 F. 2d 262; *Zander* v. *McGrath,* 85 App. D. C. 334, 177 F. 2d 649; *Josephberg* v. *Markham,* 152 F. 2d 644 (C. A. 2); *Stadtmuller* v. *Miller,* 11 F. 2d 732 (C. A. 2); *Vowinckel* v. *First Federal Trust Co.,* 10 F. 2d 19 (C. A. 9); *Ruoff* v. *Brownell,* 14 F. R. D. 371 (D. C. D. C.); *Von Petersdorff* v. *Insurance Company of North America,* 46 N. Y. S. 2d 651 (City Court of New York). In the *Von Petersdorff* case, upholding the right to bring suit by a German national in the United States as a visitor and allowed to depart voluntarily, as was intervener, the Court stated that for purposes of maintaining an action, and under the Trading with the Enemy Act, plaintiff should be regarded as a resident and not as an enemy alien not entitled to sue in the absence of a proclamation by the President under §2(c) of the Act extending the statute to enemy nationals in the United States. If "resident within" enemy territory means more than presence in enemy territory surely "resident outside the United States" in the same sentence of the statute must mean at least presence outside the United States. It has not been and could not be contended that a person present in the United States all during the war was nevertheless resident, by domicile or otherwise, in enemy territory and is therefore an enemy within the Act. Equally it cannot be contended that under the same sentence of the statute a person not outside the United States during the war was resident outside the United States for purposes of the Act. Congress intended that presence in enemy territory and more was required to constitute residence in enemy territory, and equally Congress intended that presence outside the United States at least was required to constitute residence outside the United States for purposes of the Act.

In the *Guessefeldt* opinion the Supreme Court refers to the sparse legislative history on this point and in particular to the remarks on the floor of the House by Representative Montague, one of the managers of the bill, who stated (55 Cong. Rec. 4922):

> "The word 'residence' is much broader than the word 'domicile.' Domicile would perhaps give you the idea of permanency, of a legal habitat, but the word 'resident' means a sojourner staying or residing in."

Applying this definition to intervener he was a sojourner staying or residing in the United States and not outside the United States. The Court in its opinion (R. 41a) expressly states that he was a sojourner here which the statutory history indicates is a synonym for "resident" used in the statute.

Assistant Attorney General Charles Warren, principal draftsman of the bill which became the law, emphasized that the purpose of the statute was designedly to be less strict than the common law concept of restrictions on doing business with the enemy. (Hearings before Senate Subcommittee on Commerce on H.R. 4960, 65th Cong., 1st Sess., pp. 131, 137.) It is submitted that it is contrary to the entire tenor of this legislation and wholly unprecedented to charge a person in the United States for over ten years, from 1940 to 1950, with being a "resident outside the United States" for purposes of the Act.

Decisions determining that alien visitors who remained as sojourners in the United States during World War II are resident aliens for federal income tax purposes are analogous. *Commissioner* v. *Patino,* 186 F. 2d 962 (C. A. 4); *Commissioner* v. *Nubar,* 185 F. 2d 584 (C. A. 4). It would be inconsistent to hold such an alien sojourner a resident for purposes of levying federal income taxes on his property and holding him a "resident outside the United States" for purposes of appropriating his property entirely as an enemy alien.

The statutory scheme of the Act is to deal with persons outside the United States differently than persons inside the United States and subject to its criminal laws. Section 2, therefore, classifies as enemies, subject to seizure of property within the power of the United States, persons outside the United States if resident in enemy territory or resident elsewhere outside the United States and doing business in enemy territory. But §3 exercises control over "any person in the United States" by making it a crime to trade with the enemy. Thus a logical scheme of control is enacted and persons in the United States are not classified as enemies unless the President so proclaims under §2(c). In view of the fact that intervener was within the United States from 1940 to 1950 and subject to the criminal sanctions of §3 of the Act, it is submitted that it was never the intention of Congress that such persons could be treated as "resident outside of the United States" doing business in enemy territory.

Even if he were merely a sojourner in the United States he was not a resident either in enemy territory or outside the United States for purposes of the Act. No such residence outside the United States was proved or found. In the absence of such proof or finding the determination of the Court below that intervener was an enemy by reason of residence outside the United States should be reversed.

C. Intervener Did Not Do Business Within Hungary on or After December 13, 1941.

The Court below held that the intervener was "doing business within" Hungary after that nation became an enemy of the United States on December 13, 1941 solely because in 1939, upon request, he renewed some undefined powers of attorney to Transdanubia Bauxite, A.G.'s lawyer in Budapest to conduct its affairs "on behalf of Uebersee Finanz-Korporation" (Fdg. 69, R. 74a-75a). The intervener submits that even if this issue were properly in the case, which is denied, it is demonstrable that those undefined powers of attorney supply no sufficient factual basis whatever for determining that intervener was doing business within Hungary on and after December 13, 1941. He came to the United States in May, 1940 and he had no connection or contact with Hungary thereafter.

The Court sought to meet this contention by stating that intervener's "strong personal interest in the welfare of the corporation makes his relationship to Transdanubia more direct than those of Uebersee and his father in whose interest he was acting" (R. 43a). Thus the trial Court reached the extraordinary conclusion that although plaintiff corporation, enemy tainted because of the Opel father's control, was not doing business within Hungary through its wholly owned subsidiary, nevertheless intervener, held not to control Uebersee, was so doing business although at most merely acting on behalf of plaintiff corporation in respect of Transdanubia.

1. *The evidence.*—The only evidence of any even indirect contact of intervener with Transdanubia after he came to the United States was that "in the spring of 1941 Fritz von Opel refused requests from the officers of Transdanubia Bauxite, A.G. for additional funds in order that mining operations could be continued and he suggested that the mines be sold or leased" (Fdg. 31, R. 65a). If anything this was evidence of a refusal to do business within Hungary even before the war. The trial Court,

however, found and concluded that intervener's "employment of agents to conduct the business of Transdanubia Bauxite, A.G. was doing business within enemy territory" (Con. 10, R. 86a). The only evidence to support the trial Court's findings and conclusion were three letters from Transdanubia's Budapest attorney, Dr. Timar, to intervener in Zurich in August and September 1939 (Defendant's Exhibits 127, 128, 129; R. 1036a-1042a). The first letter of August 18 requests two powers of attorney to "sign in your name for the firm of Transdanubia Bauxite" and two additional powers in "the matter of Fayer and Koranyi" which involved pending litigation.[16] Dr. Timar's second letter of September 4 concludes with the statement that "I also urgently need the powers of attorney which I sent to you" (R. 1040a). The third letter of September 21 merely acknowledges receipt of "the powers of attorney which you placed at my disposal" (R. 1041a). There is no evidence whatever of the termination date of these powers if any, the extent of the powers granted, or what was done under them except intervener's testimony.

The intervener explained that Dr. Salusinszky had been legal counsel for Transdanubia and had powers of attorney for specific tasks such as a criminal suit against Mr. Fayer, registration of stock and foreign exchange matters (R. 300a) and as legal counsel he did the accounting work and filed the tax declarations for Transdanubia (R. 301a). After Dr. Salusinszky's death in an automobile accident in July 1939 Dr. Timar, law partner of Dr. Salusinszky, did the legal work which Dr. Salusinszky had done (R. 303a), and requested and was given powers of attorney for specific purposes to represent Transdanubia (R. 304a-305a). The intervener explicitly and repeatedly denied that he had given anyone a sweeping power of attorney or that he had given anyone power to sign intervener's name for Transdanubia (R. 305a, 306a, 307a, 316a, 422a). The intervener explained that he could not sign for Transdanubia but only its representatives, including Dr. Timar, could sign and that what Dr. Timar meant by the phrase in his letter was that he wished powers of attorney to permit him to act for Transdanubia on behalf of Uebersee in relation to the Hungarian authorities in respect of registration of Transdanubia's shares and dealing with foreign currency regulations (R. 305a-306a). The intervener's testimony that the powers of attorney sent to Dr. Timar were in relation to Transdanubia and Uebersee and that intervener had no business whatsoever of his own in Hungary apart from Transdanubia's business (R. 422a), was unchallenged and for that reason the Court included in its findings at intervener's request the qualifying last clause of Finding 69 to the effect that Dr. Timar's actions under the powers of attorney were "to be performed on behalf of Uebersee Finanz-Korporation" (R. 74a-75a). The Court, however, in the complete absence of any evidence of the contents of the powers of attorney and in the teeth of the uncontradicted testimony of intervener that he did not give power to sign his own name, did find on the basis of a phrase in one of Dr. Timar's letters, that the powers of attorney did empower Dr. Timar "to sign the name" of Fritz von Opel for Transdanubia on behalf of Uebersee (Fdg. 69, R. 74a-75a). The Court concluded that even in the absence of evidence or a finding that Uebersee was doing business in Hungary, Fritz von Opel's relationship to Transdanubia was more direct than that of Uebersee and of his father in whose interest he was allegedly acting (Fdg. 74, R. 76a). In this regard it should be noted that in order to find Uebersee tainted the Court below found that Wilhelm von Opel, residing in Germany, and not intervener, present in the United States, controlled Uebersee. But now, inconsistently we submit, intervener is charged with control of Uebersee's subsidiary Transdanubia. If intervener and not Wilhelm von Opel controlled Uebersee its claim should have been determined on the basis whether intervener, and not his father, was an enemy under the Act.

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[16] There is no evidence that these two additional powers involved "doing business" or that their purpose was not accomplished before December 13, 1941.

The intervener submits that in the absence of a finding that Uebersee was doing business in Hungary, and in view of the uncontradicted testimony that intervener had no business in Hungary except the business of Transdanubia, Ubersee's wholly owned subsidiary, and in view of intervener's insistence that he had not given power to sign his name and that his name was not signed for the corporation, the phrase in Dr. Timar's letter that he sought powers of attorney to sign intervener's name for Transdanubia is not binding on intervener and is a wholly insufficient factual basis for a determination that intervener in the United States after April 1940 was doing business in Hungary on and after December 13, 1941. The intervener should not be stigmatized as an enemy doing business in enemy territory, forfeiting all of his property in the United States, on the basis of such a phrase in a lawyer's letter from Budapest in 1939.[17]

2. *The law.*—Section 2 of the Act defines the words "to trade" but does not define the phrase "doing business within" enemy territory. There appears to be no substantial body of judicial authority on what constitutes doing business within enemy territory. In *Compagnie Internationale de Produits Alimentaires* v. *Miller,* 266 U. S. 473, on remand to determine whether the plaintiff Swiss corporation was doing business in Germany the Court below ruled for plaintiff and in an unreported opinion of November 6, 1928 stated (Equity No. 42058, Bailey, *J.*):

> "It is clear that Congress in using the words 'doing business' had in mind the construction placed upon them by the Supreme Court and I think that the Court in the case of *Cannon Manufacturing Co.* v. *Cudahy*

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[17] In view of intervener's genuine surprise at the introduction of this issue for the first time at the trial and the complete lack of any opportunity to get the powers of attorney from Budapest or to seek other evidence on the issue, intervener on the settlement of the findings urged the District Court in its discretion to place its determination solely on the independent ground of enemy taint and not also on this ground of intervener's doing business in Hungary, but the trial Court refused.

> *Packing Co.*, 267 U. S. 333 is conclusive of this case. It results therefore that the plaintiff is led to the relief sought in its appeal."

The legislative history makes it clear that Congress used the phrase "doing business" in the Act with the meaning the Courts had given it in determining whether a corporation was present and doing business in a state so as to be subject to process. No special statutory definition was included in the Act[18] as in the case of the phrase "to trade". The decisions both prior to and subsequent to enactment of the Act in 1917 clearly held that a parent corporation does not do business where a subsidiary corporation does business by virtue of the stock ownership. *Peterson* v. *Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 391;[19] cf. *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*, 267 U. S. 333; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79; *Echeverry* v. *Kellogg Switchboard & Supply Co.*, 175 F. 2d 900 (C. A. 2).

Under the English Act the cases also recognize that limited corporate activity in enemy territory to preserve corporate identity is not "carrying on business" in enemy territory, unless the corporation goes further and engages in ordinary business transactions. *Central India Mining Company* v. *Societe Coloniale Anveroise* [1920], 1 K. B. 753; *Re Hilckes, ex parte Muhesa Rubber Plantations* [1917], 1 K. B. 48; Webber, *Effect of War on Contracts* (2nd Ed. 1946), p. 114; Howard, *Trading with the Enemy* (1943), p. 12; McNair, *Legal Effects of War* (1948), p. 65.

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[18] Senate Report No. 113, p. 4, and Hearings, pp. 136-137 on H. R. 4960 (65th Cong., 1st Sess.) at which Assistant Attorney General Charles Warren, author of the bill which became the Act, testified on July 27, 1917 as follows:

> "In defining 'enemy' we used the words 'doing business within such territory'—that is, doing business within Germany; and we used these words with intent, because the words 'doing business within the State,' of course, have been construed many times by the Supreme Court. It is a well recognized phrase and has a clearly defined meaning.
>
> Personally I say we used the words 'doing business' because those words have been given a definite meaning by the Supreme Court, and I was surprised to find that anyone misunderstood them."

[19] In the *Peterson* case, *supra*, the Court stated (p. 391):

> "The fact that the Pacific (parent) company owns the controlling amount of the stock of the Gulf (subsidiary) company and has thus the power to change the management does not give it present control of the corporate property and business. *Pullman's Palace Car Co.* v. *Missouri P. R. Co.*, 115 U. S. 587, 597."

And at p. 393:

> "But, as was well observed by Judge (afterward Justice) Jackson in *United States* v. *American Bell Telephone Company*, 29 Fed. Rep. 17: 'For one person to supply means for another to do business on is not the doing of that business by the former.' "

The view expressed in these decisions that a course of business in enemy territory is required to characterize a neutral corporation as an enemy is in accord with the dual purpose of the Act which is to prohibit the carrying on of business with the enemy while at the same time recognizing the rights of neutrals and protecting our own trade with neutrals in aid of our war effort. A contrary view, treating neutral ownership of an enemy corporation as carrying on of business, would unnecessarily disrupt relations with neutral corporations and their governments and in addition would be an unfortunate precedent in any future war justifying seizure of properties of American corporations located in foreign territories on the ground that ownership of an enemy subsidiary by the American corporation constituted doing business within enemy territory.[20] The Court below does not deal directly with the problem of how intervener stockholder, but not Uebersee corporation, could do business in Hungary after December 13, 1941 by renewing a power of attorney for Uebersee's subsidiary in 1939, but relies on a one sentence statement in the opinion, without citation of authority, that "The activities of Dr. Timar as agent under powers of attorney given him by Fritz von Opel are attributable to the latter" (R. 43a). There is no finding of fact that intervener was doing business within enemy territory or even that Dr. Timar was doing business after December 13, 1941 by virtue of the power of attorney but one of the conclusions of law does state that his employment of agents to conduct Transdanubia's business was doing business within enemy territory (Con. 10, R. 86a). The intervener submits that judicial authority forbids giving such a far reaching effect to a power of attorney given more than two years before the war on behalf of a parent corporation to the attorneys for a subsidiary corporation which subsequently becomes an enemy so that it may be considered that the individual who gave the power of attorney on behalf of the parent corporation thereafter, more than two years later, finds himself doing business in enemy territory through the agency of the attorneys for the subsidiary corporation and even though he is in the United States and forbidden to trade with the enemy.

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[20] For example, General Motors Corporation owns properties in many countries including the ownership of Adam Opel Works, A. G. in Germany which was engaged during the war in making transportation equipment for the German armed forces. Section 2(a) of the Act expressly excludes American corporations from the definition defining enemy corporations as corporations incorporated within enemy territory "or incorporated within any country other than the United States and doing business within such territory."

It is the general rule that war suspends all commercial intercourse between the citizens or residents of the belligerent states and as a consequence of this fundamental proposition no active business can be maintained directly or through an agent. It is an exception to the rule, by way of indulgence to soften the severities of war, that allows an agency to continue for the limited purpose of payment of debts to an enemy's agent residing in the state of the debtor. Moreover, the continuation of an agency normally terminated by the commencement of war requires the assent of both the principal and the agent. It is not enough that there was an agency prior to the war. It would be unjust to hold a principal responsible for what an agent might do in enemy territory after the commencement of war. The assent of the principal will not be presumed if this would impose upon him some new obligation or burden as it is sought to do in this case. *New York Life Insurance Co.* v. *Davis,* 95 U. S. 425, 429-430; *Williams* v. *Paine,* 169 U. S. 55, 73, affirming 7 App. D. C. 116; *Sutherland* v. *Mayer,* 271 U. S. 272, 288, 297; *Cramer* v. *United States,* 7 Ct. Cl. 302; cf. *Strauss* v. *Schweitzerische Kreditanstalt,* 45 F. Supp. 449 (S. D. N. Y.).

The decisions holding that an agency continues after the commencement of hostilities are based upon the principal's ratification of the agency following the outbreak of hostilities, *Williams* v. *Paine, supra,* or uphold an agency to protect the principal and not to stigmatize him as an enemy as in the present case. *Second Russian Insurance Co.* v. *Miller,* 297 Fed. 404 (C. A. 2), affirmed 268 U. S. 562.

The English authorities deal expressly with the effect of war on powers of attorney given to attorneys and hold that the power of attorney ceases and that the attorney is not authorized to act for his principal. *Sovfracht* (*V/O*) v. *Van Udens Scheepvaart en Ageentuur Maatschappij,* [1943] A. C. 203, reversing [1942] 1 K. B. 222; *Daimler Co.* v. *Continental Tyre & Rubber Co.* [1916], 2 A. C. 307, 377. In the *Sovfracht* case the Soviet party to an arbitration being conducted by English solicitors under powers of attorney from the other party, a Dutch corporation, raised the question that the occupation of Holland by Germany on May 10, 1941 made it enemy occupied territory and terminated the power of attorney of the English solicitors to proceed with the arbitration. The House of Lords so held and Lord Porter stated (at p. 254) that:

> "[T]he authority of an agent ceases on the ground that it is not permissible to have intercourse with an enemy alien and the existence of the relationship of principal and agent necessitates such intercourse. * * * The very relationship requires it even if it is desired only to terminate the mandate itself." [21]

Lord Wright added, at page 236:

> "A retainer, like any other contract or employment, is abrogated when the client who is the principal becomes an enemy." [22]

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[21] Lord Porter (p. 255) expressed disapproval of *Tingley* v. *Müller* (1917), 2 Ch. 144, involving a power of attorney from a German principal granted before the war to transfer land in England after commencement of hostilities (similar to the power of attorney involved in *Williams* v. *Paine, supra*) and stated that even if such a power did continue it was an exception to the general rule.

[22] Accord. *Blackwell* v. *Willard,* 65 N. C. 555, 6 Am. Dec. 749.

Similarly in the *Daimler* case, *supra,* a leading authority on the war status of a domestic corporation controlled by enemy directors and stockholders, the House of Lords held that the secretary of an English corporation, practically all of the shares of which were owned by a German corporation, had not been authorized, and after the outbreak of war could not be authorized without unlawful trading with the enemy, to bring an action in England for the price of automobile tires sold to the defendant.

The intervener submits (1) that the reference in Dr. Timar's letters of 1939 to some undefined powers of attorney to act for plaintiff corporation in respect of its Hungarian subsidiary is no substantial evidence binding on intervener that such powers of attorney existed more than two years later when the United States and Hungary became enemies on December 13, 1941; (2) that there is no evidence of any actions under the power of attorney by Dr. Timar after the commencement of war with the United States;[23] (3) that in any event the evidence is clear that Dr. Timar was plaintiff corporation's agent and not the intervener's agent because Dr. Timar's activities were "to be performed on behalf of Uebersee Finanz-Korporation"[24] (Fdg. 69, R. 74a-75a); (4) that there is no evidence, or even a claim of any connection of intervener with Dr. Timar after December 13, 1941 and, in fact, the record discloses that in the spring of 1941 intervener refused requests from Transdanubia for additional funds to continue the mining operations and suggested that the mines be sold or leased (Fdg. 31, R. 65a); and (5) and in any event the alleged agency is of a character which was plainly terminated under the applicable rules of law forbidding intercourse with the enemy.

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[23] When Hungary together with Germany was at war with the United States the only fair presumption, in the absence of evidence of acts by Dr. Timar under the alleged powers of attorney, is that the bauxite mining was conducted under the managers appointed by the government (R. 321a) and not by an attorney with a power of attorney to register stock and take care of such corporate formalities. It would not be claimed that the Opel Works, A. G. was operated during the war pursuant to powers of attorney to lawyers granted by its parent, General Motors Corporation, to represent the parent's interests. Similarly it cannot be claimed in the absence of proof that Transdanubia continued to be operated under any powers of attorney from Uebersee allegedly given on its behalf by intervener in 1939.

[24] If intervener, present in the United States, was the principal, the war terminated the agency. But since plaintiff corporation was the principal it may very well be that the validity and continuation of the power of attorney was governed not by American law but rather by the law of Switzerland where the power of attorney was executed and by the relations between Switzerland and Hungary. Restatement, *Conflict of Laws,* §§342, 346 and 357; *Maspons* v. *Mildred* [1882], 9 K. B. D. 530, 8 App. Cas. 874; Cheshire, *Private International Law,* 4th Ed. 233, 234; Section 315, *Hungarian Law of Civil Procedure;* noted in Wachtell, *Powers of Attorney in Central European Jurisdictions,* 68 U. S. Law Review 191.

III.

The trial Court's application of *res judicata* is reversible error.

The trial Court in its first pretrial opinion (R. 21a) granted defendant's motion asserting the separate defense in its answer (R. 8a) and ruled that under the doctrine of *res judicata* intervener in trying his cause of action would be bound by all the findings and conclusions made upon the former trial of Uebersee's cause of action and therefore the Court would receive only evidence "supplementary to but not contradictory of the prior findings and conclusions" (Conc. 7, R. 86a). The trial Court in its second pretrial memorandum opinion (R. 34a-35a) granted defendant's motion and held that the interest of intervener in Uebersee's shares, and consequently in the vested property, was to be determined by German law and not by Swiss law as intervener contended. Apparently the trial Court relied both upon *res judicata,* because of the prior determination of the usufructuary interest under German law, and also on rules of conflict of laws in applying German law and excluding Swiss law.

A. *Res Judicata* Was Erroneously Applied.

The intervener in opposing the application of *res judicata* urged that the findings and conclusions made upon the first trial were based on voluminous evidence on a variety of issues which were not involved in the second trial;[25] that the Court at the first trial had refused to permit intervener to litigate his own interests in the vested property (R. 23a-24a); and that therefore intervener should not be bound by the former findings and conclusions. The two issues involved upon the intervener's trial were whether he was enemy tainted and ineligible to recover and, if not, the extent of his proportionate share in the vested property. The intervener submits that it was prejudicial error to limit him on those issues by all the findings, and in effect all the evidence, offered on a great variety of different issues on the first trial. In particular it was fatally prejudicial to rule that the findings of German law in respect of the usufructuary rights in Uebersee's shares, on the issue whether such rights were sufficient to taint Uebersee, were also binding upon intervener to the exclusion of Swiss law in his effort to prove the extent of his rights as legal owner of Uebersee's shares. The intervener was entitled to an independent trial of the issues raised by his complaint as intervener and the defendant's answer to that complaint unhampered by all the findings and evidence offered on a variety of different issues between different parties on the first trial.

1. *There was no "final" judgment for res judicata.*—One of the definite procedural limitations of *res judicata* is the rule that there must be a final judgment before it can be invoked. *United States* v. *Munsingwear,* 340 U. S. 36, 38; *Angel* v. *Bullington,* 330 U. S. 183; 307 U. S. 241; *Restatement of the Law of Judgments,* §41;[26] Freeman, *Judgments,* §720 (5th Ed., 1925).

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[25] On the first trial a large part of the voluminous evidence related to several issues raised by defendant and rejected by the Court including the issues that (1) the gift to intervener was a sham; (2) intervener was an agent of the German government and therefore an enemy under §2(b) of the Act; and (3) plaintiff corporation was doing business in Hungary. Evidence offered on these issues, or to impeach intervener's credibility on the issue of the *bona fides* of the gift, was in part the basis for the findings held to be binding on the intervener on the second trial.

[26] Sec. 41 provides (*Restatement*, p. 161): *"The rules of res judicata are not applicable where the judgment is not a final judgment."*

(Continued)

In the *Munsingwear* decision, *supra,* the Supreme Court refers to its practice of reversing or vacating judgments where a party does not have a complete opportunity to litigate, because of mootness in that case, in order to avoid *res judicata.* Because intervener had not been allowed to litigate his rights upon the former trial the Supreme Court applied this rule and in remanding the case for this purpose was careful to *vacate* the judgment below as follows (343 U. S. at p. 213):

> "The judgment of the Court of Appeals is affirmed as to petitioner, but in view of the novel holding in *Kaufman,* the Court is of the opinion that its decision in *Hormel* v. *Helvering,* 312 U. S. 552, is applicable. We accordingly vacate the judgment of the court below and remand the cause to the District Court for consideration, in the light of *Kaufman* and this opinion, or any application that may be made on behalf of Fritz von Opel within 30 days from the date of remand, and in all other respects the judgment is affirmed."

The trial Court took the view that affirmance of the judgment as to Uebersee made it binding on intervener (R. 27a). Intervener asserts this was error and that the procedural disposition of this case by the Supreme Court establishes the law of the case and prohibits the application of the doctrine of *res judicata* against intervener. If intervener could not litigate any matter litigated by Uebersee at the prior trial the remand would be in part useless. That certainly was not the intention of the Supreme Court which, like this Court (89 App. D. C. 167 at 169, 196 F. 2d at 559) in its opinion, carefully limited its decision and refrained from discussing such grounds of the trial Court's decision as intervener's actions or sympathies as an additional sup-

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Comment d under this section states in part (p. 163): "If, however, a judgment has been vacated by the trial court, or reversed by an appellate court it is no longer conclusive between the parties, either as a merger of the original cause of action or as a bar to an action upon the original cause of action; nor is it conclusive by way of collateral estoppel in a subsequent action on a different cause of action involving issues litigated in the original action."

port for the determination that plaintiff corporation was tainted (82 F. Supp. 602, 606). This Court and the Supreme Court did not pass on the trial Court's rulings that Uebersee's ownership of Transdanubia and intervener's activities were further evidence of enemy taint. Thus neither intervener, nor Uebersee for that matter, obtained any appellate review of the findings or of this evidence of alleged enemy taint, and yet intervener was held bound by all these findings on the trial of his cause of action and was limited to evidence supplementary to but not contradictory of the findings.' The intervener submits that thus the trial Court deprived intervener of the new trial *de novo* which the Supreme Court intended when it vacated the former judgment to permit intervener to assert his rights.

2. *Intervener was not in "privity" with Uebersee.*—The intervener also contended that *res judicata* was not applicable because the former judgment was between different parties, the defendant and Uebersee. The Court below however, applied the general rule that one in privity with a party to a litigation terminating in a valid final judgment is bound by the judgment (*Restatement of Judgments,* §84) on the ground that the test of privity in this case is intervener's control of and participation in this action on behalf of plaintiff corporation (R. 28a).[27] The Court sought to distinguish authorities cited by intervener (R. 27a-28a) on the ground that in those cases the corporation was treated as a separate entity but an intervention by a stockholder of any enemy tainted corporation is based upon piercing the corporate veil to determine all interests in the corporation (R. 28a). It is submitted that this attempted distinction is not valid and that a special exception to the ordinary application of the rules of *res judicata* to a corporation

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[27] It may be noted that although Uebersee's enemy taint is based on the finding of Wilhelm von Opel's ownership and control of Uebersee and the rejection of intervener's claim at the former trial of his ownership and control, as sole stockholder, in this instance intervener's control is asserted to support a ruling against him as in the case of his activities in Hungary before the war for Uebersee. This inconsistency works an unfair result.

and its stockholders should not be created for litigation under the Trading with the Enemy Act.

The general rule that a final judgment binds the parties and those in privity with them does not destroy the distinction between a corporation and its stockholders and make them one party not only for the corporation's litigation but also for a stockholder's subsequent litigation as an individual. An individual will not be barred from litigating all issues involved in his own personal cause of action simply because the same or similar issues may have been litigated in the cause of action of a corporation of which he is the stockholder. *Hornstein* v. *Kramer Bros. Freight Lines,* 133 F. 2d 143 (C. A. 3); *Macan* v. *Scandinavia Belting Co.,* 264 Pa. 384, 107 A. 750, 5 A. L. R. 1502; cf. *American Range Lines* v. *Commissioner,* 200 F. 2d 844 (C. A. 2).

The *Hornstein* case, *supra,* involved a prior negligence action by a corporation, Hornstein, Inc., for damages to its automobile in a collision with a trailer truck owned by one of the defendants and operated by the other defendant, Kramer Bros. Freight Lines, Inc., which had obtained a judgment against Hornstein, Inc. in the prior action. Frank Hornstein had signed both his own and the corporation's statement of claim and had testified in both suits and the same counsel had represented him and his corporation. The Court of Appeals held that there was not such privity between the corporation and the stockholder as to bar the latter's action for negligence against the same party which had defeated the corporation's action for negligence. Similarly, the stockholder here is not barred in his action because the plaintiff has failed in its action.

3. *The issues in the two trials are different.*—The intervener also contended in the Court below that *res judicata* did not apply because the two issues to be tried, his alleged taint as a stockholder and the measure of his proportionate share of the vested assets, were different from the many issues formerly tried and determined, including the issue of Uebersee's enemy taint which disposed of the former case. The intervener objected to being bound by all the findings

made on these other issues. For example, the intervener in particular contended that even though Uebersee and defendant tried the issue of the establishment, extent, and termination of the usufruct under German law the intervener, as a new party asserting his own rights, was entitled to invoke applicable Swiss law as well as his own evidence of German law. The defendant contended that the former determination of his parents' usufructuary interest in plaintiff corporation's shares under German law also finally determined intervener's interest therein. The defendant objected to intervener's evidence sought by depositions in Germany and Switzerland, in part in respect of German and Swiss law applicable to intervener's property interest in plaintiff corporation's shares, as an attempt to modify the findings already made. The intervener contended that in fact the two issues of his enemy taint as a stockholder and his property interests as sole shareholder of Uebersee were never litigated although evidence bearing to some extent on those issues was introduced at the first trial on other and different issues such as his credibility, the establishment of the gift and his father's relations with the plaintiff corporation.

These opposed contentions were disposed of by the first pretrial opinion (R. 21a-31a) which recognized that since intervener's "interest, attachment or sympathy for Germany were considered only as they related to plaintiff corporation's enemy taint and were not specified, measured or evaluated as they might relate to intervener's innocence or enemy status, it seems proper to receive additional factual information" on intervener's Liechtenstein naturalization and German nationality and on "his activities, associations and sympathies and his ties to his native country, as indicative of intent in this regard" (R. 25a). Thus the Court recognized that the issue to be tried, intervener's innocence or taint, was different from the issue of Uebersee's taint by reason of the enemy usufruct, but nevertheless the Court proceeded in the opinion to limit any proof offered by intervener, and its effect, by ruling that all the "findings of fact and conclusions of law which it made were the rights, questions, facts and points to be in issue which were necessary for its judgment. Fritz von Opel's interest, status and activities were considered insofar as they were necessary to determine that the neutral aspect of ownership in the property sought to be recovered was insignificant" (R. 29a). On this basis the Court concluded "that its previous findings and conclusions operated as an estoppel as to all issues framed, without prejudice to the right of either party to offer additional evidence on issues raised supplemental to, but not contradictory of, such determinations" (R. 30a). The intervener submits that *res judicata* applies, if at all, only to "ultimate issues" actually decided on the first trial and that the trial court mistakenly ruled that the issues necessarily determined to support the former judgment included the two new issues of intervener's eligibility as an innocent stockholder and his property interest in the plaintiff corporation's shares and in the vested property.[28] Intervener submits that it was inconsistent and erroneous for the Court to recognize that the issue of intervener's alleged taint was different from the issue of Uebersee's adjudged taint and then rule that the former findings were binding on intervener. Either intervener was bound on the ground that the two issues he presented had been determined, or he was not bound on the ground that the issues were different. There is no basis for the Court's middle position that although the issues are different he is bound by the former findings and judgment and may only submit evidence supplemental to, but not contradictory of, the former findings.

a. *Res judicata applies only to ultimate issues formerly decided.*—Where, as here (R. 28a), a second trial involves a different cause of action, *res judicata* applies only to ultimate issues upon the determination of which the judgment in the first trial is based. The question turns on whether the ultimate issues or merely some of the facts are the same on both trials. *Commissioner* v. *Sunnen,* 333 U. S. 591, 597-599; *Tait* v. *Western Md. Ry. Co.,* 289 U. S. 620, 623; *Southern Pacific Railr'd* v. *United States,* 168 U. S. 1, 48; *Cromwell* v. *County of Sac,* 94 U. S. 351, 353; *The Evergreens* v. *Nunan,* 141 F. 2d 927 (C. A. 2), 152 A. L. R. 1187; *United States Fidelity & Guaranty Co.* v. *McCarthy,* 33 F. 2d 7 (C. A. 8); *Buromin Co.* v. *National Aluminate Corporation,* 70 F. Supp. 214 (D. Del.); *United States* v. *Cathcard,* 70 F. Supp. 653 (D. Neb.); *Schofield* v. *Rideout,* 233 Wis. 550, 290 N. W. 155, 133 A. L. R. 834; *Paulos* v. *Janetakos,* 46 N. M. 390, 129 P. 2d 636 (New Mexico), 142 A. L. R. 1237; *Restatement of the Law of Judgments,* §68;[29] *Developments of the Law—Res Judicata,* 65 H. L. R. 818, 842; 30 American Jurisprudence, *Judgments,* §181 (1953 Supp.).

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[28] It may be noted that the trial Court, although holding intervener bound by all the findings which had been made, stated in its opinion that the defendant might introduce evidence and attack intervener's naturalization in Liechtenstein (R. 25a) even though former findings were made that intervener did become a naturalized citizen of Liechtenstein (R. 61a). *Res judicata* binds one party only if both are bound and this rule is not affected by the fact that defendant did not choose to attack the legality of intervener's Liechtenstein citizenship.

In the leading *Evergreens* case, *supra,* the Court of Appeals (L. Hand, *J.*) upheld the Tax Court's refusal to accept a taxpayer's contention that a prior determination of the value of "fully improved" cemetery lots for prior tax years conclusively determined that value as an indisputable premise for computing the value of "partially improved" lots for subsequent tax years. The Court disagreed with the taxpayer's contention that a valuation of the partially improved lots was necessarily and inseparably involved in a valuation of the fully improved lots and then went on to discuss the effect to be given in a second suit to "ultimate" facts or "mediate" facts established in the first suit. The Court concluded its opinion as follows:

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[29] Section 68 of the Restatement provides in part:

> "(2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action."

Comment p (1942 Edition of *Restatement*) provides in part:

> "*Evidentiary facts.* The rules stated in this Section are applicable to the determination of facts in issue but not to the determination of merely evidentiary facts even though the determination of the facts in issue is dependent upon the determination of the evidentiary facts."

Following the *Evergreens* decision, *supra,* comment p was changed in the 1948 Supplement of the *Restatement* to read as follows:

> "*Evidentiary facts.* The rules stated in this Section are applicable to the determination of facts in issue, i.e., those facts upon whose combined concurrence the law raises the duty or the right in question, but not to the determination of merely evidentiary or mediate facts, even though the determination of the facts in issue is dependent upon the determination of the evidentiary or mediate facts."

> "Being free to decide, and for the reasons we have given, we do not hesitate to hold that, even assuming arguendo that 'mediate data,' decided in the first suit, conclusively establish facts, 'ultimate' in the second, no fact decided in the first whether 'ultimate' or a 'mediate datum' conclusively establishes any 'mediate datum' in the second, or anything except a fact 'ultimate' in that suit."[30]

Although the application of the distinction between ultimate and mediate facts may in some cases be elusive and difficult, it appears clear that the ultimate issues plaintiff intervener sought to try in this case, namely, his status as an innocent stockholder, and his separate interest in the vested property, were not at issue in the former trial.

b. *Plaintiff intervener's personal taint.*—It appears clear that intervener's innocence or enemy taint as a stockholder was not involved in the first trial. Indeed, the Government took the position both in this case and in the *Kaufman* case that the innocence or enemy taint of a stockholder of a neutral corporation allegedly controlled by enemies was wholly immaterial. This view apparently prevailed in the *Kaufman* case in the District Court (90 F. Supp. 1011) and in this Court (88 App. D. C. 296, 188 F. 2d 1017) and it was not until the Supreme Court's *Kaufman* decision (343 U. S.

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30 The note in 142 A. L. R. 1237, 1245, defines an ultimate fact as a "material element of the legal rights and duties in controversy, while an evidentiary fact is indifferent in itself, does not disclose its bearing on the legal relationship in controversy, and is introduced by a party solely for the purpose of proving another fact, the latter fact, because it involves a material element of the legal relationship in controversy, being the ultimate fact."

156), long after the former trial in this case, that the issue of a stockholder's innocence or enemy taint became material. The issues on the former trial were not intervener's enemy taint but rather plaintiff corporation's enemy taint by virtue of ownership or control by enemies. On those issues some evidence concerning intervener's sympathies and activities was introduced in an effort to impeach his credibility or to prove that the gift was a sham, or to establish the usufruct. Indeed, some of the Government's evidence tended to show not intervener's enemy taint but rather his innocence as a stockholder in the sense that allegedly his father and not he controlled plaintiff corporation's activities.

So far as plaintiff intervener's alleged German sympathies were concerned, the trial Court merely commented in its conclusions of law (R. 71a) and in its opinion (82 F. Supp. 602) that intervener's alleged German sympathies were merely "further evidence" of enemy taint of the plaintiff corporation. The Court of Appeals (89 App. D. C. 167, 196 F. 2d 557) and the Supreme Court in their opinions carefully refrained from any statement at all on these matters. Evidence on the former trial which may bear on the issue of intervener's personal enemy taint was introduced on a great variety of other issues but not on that issue because it was not in the case at that time. So far as intervener's relations with plaintiff corporation are concerned, some evidence involving his activities in respect of the corporation inevitably came into the former trial on a variety of issues, including the question of alleged control of plaintiff corporation by his father. Such evidence, however, was not considered to determine the issue now presented, namely, intervener's position as an innocent or enemy tainted stockholder of plaintiff corporation.

c. *Intervener's property interest not formerly in issue.*— The intervener's proof of his interest in Uebersee's shares and in the vested property unavoidably may involve consideration of any other interest found to exist in the vested property, including his parents' alleged usufructuary interest. This does not mean, however, that the legal issues are the same and that the determination of the existence and extent of the usufructuaries' life interest in Uebersee's shares on the issue of Uebersee's taint binds and concludes the legal owner of the shares upon his subsequent trial of the existence and extent of his interest in the shares. He is entitled to a separate trial on his property interest. He is entitled to prove the facts concerning the establishment and continuation of the usufruct *in rem* whether or not Uebersee proved these facts on its former trial. On the basis of these newly proved facts he is entitled to prove as a fact the Swiss law in respect of continuation and termination of the usufruct, in the event that it is decided that Swiss law applies, even though Uebersee tried the issue on German law alone. This point is more fully treated in Point III B, *infra,* p. 75.

d. Finally, even if intervener's personal taint had been in issue in the former trial, and it was not, *res judicata* would not be applicable to this issue because the judgment was affirmed on the separate ground of the parents' adjudged ownership and control of the plaintiff corporation's shares. Neither the trial Court nor the appellate Courts decided the former case on the basis of the intervener's taint. The rule is that only that ground of decision below relied upon in deciding the appeal is *res judicata* because appellant obtained no final appellate decision on the other grounds. *Moran Towing & T. Co.* v. *Navigazione Libera triestina, S.A.,* 92 F. 2d 37 (C. A. 2); *Restatement of the Law of Judgments,* §69;[31] *Development of the Law—Res Judicata,* 65 H. L. R. 818, 845-6.

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[31] Section 69 provides in part:

> "(2) Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."

Comment b provides in part:

> "b. *Affirmance of a judgment which was based on alternative grounds.* * * *. If the appellate court determines that one of these grounds is sufficient and refuses to consider whether or not the other ground is sufficient, and accordingly affirms the judgment, the judgment is conclusive only as to the first ground."

In conclusion on this point it is submitted that the Government has failed wholly to carry the burden of proof of *res judicata* which falls upon the party who invokes it. Freeman, *Judgments* (5th Ed. 1925), §768. The trial Court refused to determine intervener's separate rights upon the first trial (R. 24a); the former findings were based on voluminous evidence which covered a very wide range of issues; and the issue of intervener's status as an innocent stockholder did not arise until the *Kaufman* decision, long after the first trial. In these circumstances it was prejudicial error for the trial Court to rule that all of the findings made at the first trial were *res judicata* against the intervener and thus to deny him an opportunity to try his case completely and separately, unhampered by the former findings, where the serious consequence of an adverse decision is forfeiture of property voluntarily invested in this country by intervener in reliance upon protection of our laws.

B. Intervener's Property Rights in Uebersee's Shares Are Determined by Swiss Law and Not by German Law.

Subsequent to the Court's opinion of May 28, 1954, applying *res judicata* against intervener, defendant, again relying on the doctrine of *res judicata,* moved under Rule 16 for and obtained an order dated January 4, 1955 declaring inadmissible upon the trial expert testimony of Swiss law of intervener's interest in plaintiff corporation's shares upon the ground that German law must control the division of interest of intervener and his German parents in the property (R. 36a). In the second pretrial opinion (R. 34a-35a), granting defendant's motion under pretrial Rule 16 to exclude evidence of Swiss law, the trial Court stated that intervener's interest in the property transferred by the gift agreement executed in Germany in 1931 was defined by German law "regardless of the property into which the subject matter of the agreement was converted" (R. 35a), namely, the bearer shares of plaintiff Swiss corporation located in Zurich, Switzerland.

est. This does not mean, however, that the legal issues are the same and that the determination of the existence and extent of the usufructuaries' life interest in Uebersee's shares on the issue of Uebersee's taint binds and concludes the legal owner of the shares upon his subsequent trial of the existence and extent of his interest in the shares. He is entitled to a separate trial on his property interest. He is entitled to prove the facts concerning the establishment and continuation of the usufruct *in rem* whether or not Uebersee proved these facts on its former trial. On the basis of these newly proved facts he is entitled to prove as a fact the Swiss law in respect of continuation and termination of the usufruct, in the event that it is decided that Swiss law applies, even though Uebersee tried the issue on German law alone. This point is more fully treated in Point III B, *infra,* p. 75.

d. Finally, even if intervener's personal taint had been in issue in the former trial, and it was not, *res judicata* would not be applicable to this issue because the judgment was affirmed on the separate ground of the parents' adjudged ownership and control of the plaintiff corporation's shares. Neither the trial Court nor the appellate Courts decided the former case on the basis of the intervener's taint. The rule is that only that ground of decision below relied upon in deciding the appeal is *res judicata* because appellant obtained no final appellate decision on the other grounds. *Moran Towing & T. Co.* v. *Navigazione Libera triestina, S.A.,* 92 F. 2d 37 (C. A. 2); *Restatement of the Law of Judgments,* §69;[31] *Development of the Law—Res Judicata,* 65 H. L. R. 818, 845-6.

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The intervener contended (1) that he is not estopped by *res judicata* from offering evidence of Swiss law, and (2) that under accepted principles of conflict of laws Swiss law should be applied.

1. *Res judicata is not applicable.*—On the first trial on the issue of the validity of the gift under the gift agreement executed in Germany in 1931 and on the issue of Uebersee's eligibility to recover or enemy taint, Uebersee and defendant introduced evidence of German law on the validity of the gift and on the rights of a German usufruct in corporate shares. The Court made findings of the German law (R. 62a, 65a, 66a, 67a, 69a, 70a) concerning the rights of a usufructuary to (a) income; (b) copossession; (c) a voice in management; and (d) prevention of sale of the shares (Fdg. 52, R. 69a). The Court did not have to go further and did not go further and decide the property rights of the legal owner and the usufructuaries in the corpus or the capital of the Swiss shares. The question of a possible division of the property between the intervener as legal owner and his parents as usufructuaries did not arise until the closing arguments at the end of the first trial and no evidence of German law was offered on this issue, and the Court expressly stated that it was not deciding the issue (R. 24a). The Court's findings (R. 60a-70a) and opinion (82 F. Supp. 602) disclose no intimation that the Court was determining the extent of the intervener's interest in the corpus of the shares upon any division of the property. It was sufficient to find that the usufructuaries had *sufficient* interest in the shares of plaintiff corporation to exercise control. It was not necessary for the Court to go further and it did not do so. Consequently, the question of choice of law between Swiss and German law to determine the interests of the intervener in the property was never raised or decided on the first trial.

In its second pretrial opinion the Court below expressly recognized that the percentages of the holdings of intervener and of defendant, as successor of his parents, in

Uebersee's shares "have hitherto not been determined" (R. 34a) but nevertheless the Court ruled that since German law had been applied to determine the rights of the usufructuaries in the gift and its proceeds regardless of conversion of the property into shares of Uebersee, German law must also control determination of intervener's property rights as sole stockholder of Uebersee, a Swiss corporation. Thus the trial Court in effect ruled that in some manner at the first trial it had ruled tacitly that all rights in the proceeds of the 1931 gift in Germany would thereafter be determined solely by German law even though the gift of German shares of Adam Opel, A.G. in subsequent years was transferred into cash and common stock of General Motors Corporation and eventually into all of the shares and a debt of Uebersee Finanz-Korporation, A.G., a Swiss corporation, and even though the proceeds of the gift were never thereafter in Germany (R. 63a).

Furthermore, it is very significant on this point to note that on the first trial, the trial Court found that the gift agreement in 1931 created a mere contract claim of the Opel parents against intervener for establishment of a usufruct and did not establish a usufruct *in rem* which was first established in 1935 in Switzerland when a symbolic delivery of the bearer shares of plaintiff corporation was made by intervener to his parents' representative, Dr. Frankenburg, by the delivery of a key to the safe deposit box in Zurich, Switzerland, where the shares were held for safe keeping (Fdgs. 33-38, R. 65a-66a). Despite this crucial factor, however, the Court below ruled that intervener was bound by the findings which had been made under German law concerning the interests in the plaintiff corporation's shares and could not introduce any evidence of Swiss law to determine his property interest in the shares.

The intervener submits that the issues of German law which were tried in the first trial, validity of the gift and whether the usufructuary interest was sufficient to taint Uebersee, were so different from the new issue of intervener's property interest in Uebersee's shares at all times physically located in Switzerland, that *res judicata* was erroneously applied to bind him by the findings formerly made under German law and he should have been allowed to prove his case *de novo* under German and Swiss law, claimed by intervener to be applicable.

2. *Swiss law determines the establishment and continuation of the usufruct in rem.*—The Court below appears to place its second pretrial opinion barring Swiss law partly on *res judicata* and partly, although without citation of conflict of laws decisions, on the view that since original rights in the German gift were governed by German law the rights of the parties forevermore should be governed by German law regardless of the transfer of the proceeds of the gift to a Swiss corporation and their investment in the United States. Intervener contends that this ruling erroneously applied *res judicata* for the reasons argued above, particularly that the issue of intervener's property interest in Uebersee's shares was not an ultimate issue of fact on the former trial, and also erroneously applied the applicable rules of conflict of laws summarized below.

a. *Intention of the parties.*—The parties in the gift agreement contemplated transfer of the proceeds to the Swiss holding company which the donee had contracted to purchase prior to the gift (Fdg. 20, R. 63a). Thus the parties indicated their intention that Swiss law should be applied to their interests in the Swiss shares. It is a cardinal rule of conflict of laws that the intention of the parties will be effected if they indicate the law to be applied to the determination of their rights. *Bozeman* v. *Conn. Gen. L. Ins. Co.,* 301 U. S. 196, 202; *Compania Inv. I.* v. *Industrial Mortgage Bank,* 269 N. Y. 22, 26; *Hutchison* v. *Ross,* 262 N. Y. 381, 394; Dicey, *Conflict of Laws,* Rule 136, Subrule 2, p. 589 (6th Ed., 1949); Beale, *Conflict of Laws,* §332.2 (1935 Ed.).

b. *Interest in corporate shares is governed by state of incorporation.*—It is axiomatic that the law of the place of incorporation governs interest in shares and property of a corporation. *Restatement of Conflict of Laws,* §§53, 183;[32] Fletcher, *Corporations,* Vol. 16, §8224. For example, the appraisal of the value of a minority stockholder's shares upon the sale of all corporate assets, somewhat analogous to the division of the interests of the legal owner and the usufructuary in corporate shares, is governed by the laws of the place of incorporation. *Voeller* v. *Neilston Co.,* 311 U. S. 531; *Geddes* v. *Anaconda Mining Co.,* 254 U. S. 590. The law of the place of incorporation is applied even where it escheats or confiscates the shareholder's property. *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428; *United States* v. *Pink,* 315 U. S. 203; *United States* v. *Belmont,* 301 U. S. 324; *United Cigarette Machine Co.* v. *Canadian Pacific Ry. Co.,* 12 F. 2d 634 (C. A. 2). Even where courts apply the law of the place of the location of corporate shares to determine the validity of their transfer, it is done on the theory that the law of the state of incorporation provides that transfer shall be governed by the law of the place of location of the shares. *Disconto Gesellschaft* v. *United States Steel Corp.,* 300 Fed. 741 (S. D. N. Y.), affirmed 267 U. S. 22; cf. *Schrijver* v. *Sutherland,* 57 App. D. C. 214, 19 F. 2d 688 (App. D. C.) cert. den. 275 U. S. 546; *United Cigarette Machine Co.* v. *Canadian Pacific Ry. Co., supra.* No problem of choice between state of incorporation and state of location of the bearer shares is involved here because the shares at all times have been located in Switzerland, the state of incorporation.

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[32] §53. Shares in a Corporation.

(1) Shares in a corporation are subject to the jurisdiction of the state in which the corporation was incorporated.

(2) The share certificate is subject to the jurisdiction of the state within whose territory it is.

(3) To the extent to which the law of the state in which the corporation was incorporated embodies the share in the certificate, the share is subject to the jurisdiction of the state which has jurisdiction over the certificate.

c. *Law of the location of personal property governs encumbrances thereon.*—Interests in personal property, including such interests as chattel mortgage or pledge in such property as corporate shares or bonds, are governed by the law of the place of location of the property at the time these interests are created. *Restatement of Conflict of Laws,* §§265, 279. The usufruct *in rem,* analogous to a mortgage, lien or other encumbrance upon the shares of plaintiff Swiss corporation, is governed by the law of Switzerland where the shares were located at the time this usufructuary interest was allegedly established *in rem* in the shares in 1935 (Fdg. 37, R. 66a). *Underwood* v. *Phillips Petroleum Co.,* 155 F. 2d 372 (C. A. 10).

d. *The location of personal property determines trust interests therein.*—The validity of a trust in personal property created by an *inter vivos* transaction is determined by the law of the place where the transaction takes place. *Restatement of Conflict of Laws,* §294(2). The place of administration of a trust determines the law applicable to its administration. §297. *Warner* v. *Florida Bank & Trust Co.,* 160 F. 2d 766, 771 (C. A. 5); *United States* v. *Pierce,* 137 F. 2d 428 (C. A. 8); *Hutchison* v. *Ross,* 262 N. Y. 381.[33] In an *inter vivos* trust by parents settled upon children reserving an income for life, not dissimilar to the usufruct here involved, a trustee holds the property instead of copossession by the parent usufructuaries and the children who are the legal owners of the gift. The same considerations which lead courts to apply the law of the place of location of the property and of administration of the trust equally require that the law of the place where shares subject to a usufruct are located and managed shall govern the determination of the interests of the legal owner and the usufructuary.

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[33] In the leading *Hutchison* case Judge Irving Lehman expounds the doctrine under which *inter vivos* transactions, such as that involved here, are governed by the law of the place where the trust is established and administered rather than by the law of the domicile of the testator which has a more controlling effect on testamentary trusts as distinguished from *inter vivos* trusts.

e. *Place of performance of contracts.*—The law of the place of performance of a contract governs its performance. *Restatement of Conflict of Laws,* §358; *Zorati SS. Co.* v. *Park Bridge Corp.,* 154 F. 2d 377 (C. A. 2); *United Service Life Ins. Co.* v. *Farr,* 60 F. Supp. 829 (S. D. N. Y.). In this case it was plain that intervener's contractual obligation to give his parents a usufruct *in rem* was not to be performed in Germany, since the parties desired the subject matter of the gift to be outside of Germany, but was to be performed in Switzerland where the bearer shares of the Swiss holding company were located and into which the proceeds of the gift were to be transferred.

It is submitted that under all of the applicable rules of conflict of laws Swiss law should be applied to determine the establishment, continuation and termination of the usufruct *in rem.*

3. *Property rights of intervener under Swiss and German law.*—The trial Court's 1954 pretrial rulings held the intervener to be bound by the prior findings on German law and barred admission of evidence which had been obtained by deposition in 1953, or which might be obtained prior to trial, on intervener's rights under Swiss law. The intervener, however, made an offer of proof at the trial of the evidence of German and Swiss law which had been obtained prior to the Court's pretrial rulings and which indicates that the choice of foreign law is not academic but vitally important to the determination of intervener's property rights.[34] The intervener asserted his right to try to prove at his trial the facts, and the Swiss and German law based on the facts, to show (a) that the usufruct *in rem* was never established because the necessary co-possession by the usufructuaries in Uebersee's share was never

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[34] In view of the trial Court's pretrial rulings establishing the law of the case neither intervener nor defendant called witnesses at the trial or attempted to make a complete presentation of the foreign law on the property interests involved which will be necessary in the event of a new trial. The evidence of the German law introduced at the trial was limited to a valuation of the interests of the legal owner and of the usufructuaries as found upon the first trial.

established, and (b) if established, was lost when the shares were sold and copossession was lost.

(a) *Copossession of Uebersee's shares.*—At the first trial the experts on German law for both plaintiff corporation and defendant were agreed that copossession or joint possession by the legal owner and the usufructuaries was an absolutely necessary condition to establish the usufruct *in rem* (R. I. 314, 1351-1352).[35] In its former findings the Court relied upon delivery to his parents' agent of a key to intervener's safe deposit box where Uebersee's shares were deposited to establish their necessary copossession (Fdg. 42, R. 67a). The question whether intervener's continued independent access to his own safe deposit box prevented the necessary copossession was not considered or determined. Therefore intervener sought, but was not permitted, to introduce evidence that he retained access to his safe deposit box (R. 429a-430a) and that therefore under both Swiss and German law[36] the usufruct was not established. The Court's ruling prevented intervener from obtaining a decision on the existence of copossession which is a *sine qua non* of a usufruct *in rem.*

(b) *Loss of copossession.*—The intervener also contended that the sale of Uebersee's shares by Frima Trust

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[35] Dr. Magdalena Schoch, the defendant's expert witness, testified (Tr. 2097-8; R. former appeal 1351-1352):

> "Q. Yesterday, in discussing usufruct, the question arose about joint possession. Now it is clear in your mind, is it not, that joint possession is necessary in order to establish a usufruct in rem? A. Under German law, yes.
>
> Q. And that the usufruct remains in being, so to speak, only as long as the joint possession is present; is that right? A. Yes.
>
> Q. No question about it under German law? A. No."

[36] Dr. Ulrich Hoche, intervener's expert witness on German law, testified that a German Court would apply Swiss law to determine the question whether a usufruct *in rem* was established in Swiss shares (R. 916a) but that if German was there applied it is doubtful that a usufruct *in rem* would be established by the legal owner delivering a key to a safe deposit box and a power of attorney to enter the box to an agent of the usufructuaries (R. 916a).

Dr. Paul Gmür, intervener's expert witness on Swiss law, testified that under Swiss law the legal owner's retention of independent access to a safe deposit box and limited access of the usufructuary's agent to the box would prevent a usufruct *in rem* from being created (R. 934a, 974a).

Moreover, intervener seeks an opportunity to offer evidence on a trial of the issue, under applicable foreign law, whether a usufruct *in rem* in Uebersee's shares established a usufruct *in rem* in the large part of the proceeds of the gift given to Uebersee as a loan and not in exchange for its shares (R. 839a).

Establishment (of which intervener was sole beneficiary) in 1936 to a group of Swiss nationals under an option to repurchase which was not exercised until 1941, constituted a loss of copossession of the shares by the usufructuaries and a termination of the usufruct which was not reestablished in 1941. Dr. Eugen Meier, President of the Administrative Board of Uebersee, and Mr. Adolf Gaeng, a member of the Board and also a representative of Frima Trust Establishment, testified to the facts concerning the removal of the Uebersee shares from intervener's safe deposit box and their delivery to intervener's bankers, Adler & Company, who handled the sale of the shares under the repurchase agreement (R. 883a-886a). Dr. Hoche, the intervener's expert witness on German law, and Dr. Gmür, intervener's expert witness on Swiss law, both testified that the sale of the shares and their transmittal to the purchasers involved a loss of copossession which was not restored when the shares were repurchased in 1941 (R. 918a, 946a). The Court's rulings excluding this evidence prevented intervener from establishing that the usufruct was terminated long before the war and that he was the sole beneficial owner of Uebersee's shares and of the vested property. The intervener submits that the refusal of the Court below to try these issues constitutes reversible error entitling intervener to a new trial. The view of this Court on the former appeal, in the absence of this evidence, that copossession was not lost (88 App. D. C. 182, 191 F. 2d 327) should not deprive intervener of a trial on the evidence.

4. *Intervener has the full rights of legal owner of Uebersee's shares.*—If intervener is an eligible claimant but is bound by the prior findings of German law that a usufruct *in rem* exists in Uebersee's shares, the remaining question is the evaluation of intervener's interest. The trial Court states that the evaluation should be made as of December 11, 1941, when the war between the United States and Germany began, and finds that a German court would

compute the interests of the legal owner and usufructuaries on the basis of the estimated income from the property from that date for the period of the life of the parents (R. 58a). For example, if the estimated future income from the substantial vested property was $100,000 a year after Uebersee's corporate taxes and expenses, and if the parents' life expectancy in 1941 was ten years, the value on December 11, 1941 of their right to receive $100,000 a year for ten years would be something less than $1,000,000 (R. 140a-142a).[37] Upon a division this amount would be retained by defendant as successor to the usufructuaries and the remainder would belong to intervener.[38]

The intervener contends that if he is bound by the former findings of German law on the continued existence and extent of the usufruct and is not entitled to a trial *de novo* on that issue on Swiss as well as German law, he has at least all the rights of a legal owner not reserved to the usufructuaries under the provisions of the German Civil Code (Int. Ex. 16, R. 843a) and upon any judicial division of the property he should receive all the vested assets except that part attributable to his parents' right to receive the income, or 80% of the income, for life. The Court below, however, limited intervener's interests as legal owner of property subject to a German usufruct in two important respects to which brief reference will be made in order that intervener will not be thought tacitly to accept these limitations in the event of further proceedings herein.

(a) *"Other interests" of the usufructuaries.*—The former findings of fact of German law on the rights derived from a niessbrauch (usufruct) are limited to the rights granted by the German Civil Code and there is no finding of "other rights" in the usufructuaries (Fdg. 52, R. 69a-70a). The Supreme Court in *Uebersee II* (343 U. S. at 207, 208) carefully quoted and relied upon this finding of German law and did not suggest that the Opel parents had any "additional rights" further restricting the legal owner's rights in the property. Nor did this Court (89 App. D. C. 167, 196 F. 2d 557), ruling that the ordinary rights of a usufructuary were sufficient to taint Uebersee, rely upon any such undefined "additional rights". The trial Court, however, in its first opinion (82 F. Supp. at 605), not supported by any finding of German law, referred to "the usufructuary *and other interests*" of the Opel parents. In the last opinion below (R. 55a) and in its additional findings the Court again emphasizes these "other interests" of the Opel parents and finds that under German law a usufructuary having sole possession, control, and power of disposition over property has full beneficial interests (Fdg. 101, R. 84a) and that because the Opel parents had such a completely dominant beneficial interest the intervener's interest in the property was without value during the usufruct (Fdg. 102, R. 84a). It is recognized that this finding, for practical purposes of division of the property, may be unimportant because modified by the subsequent finding that even assuming, admittedly in the absence of any conclusive evidence, that Wilhelm von Opel's power of disposition of the property was unlimited, nevertheless "this did not destroy the rights of the legal owner" (Fdg. 104, R. 84a), and upon termination of the usufruct he would be entitled to all of the property or the proceeds thereof not attributable to the income interests of the usufructuaries. At the present time, however, the intervener wishes to record his position that there is no basis whatever in the record for finding that the Opel parents had not only the extensive rights of usufructuaries under German law but in addition had some undefined "other rights" of sole possession and complete disposition of the property not supported by the evidence.

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[37] The American Experience Table of Mortality with Interest at 4% provides that the present value of an annuity of $1.00 per year for life payable at the end of a year for persons 67 years of age, Marta von Opel's age in 1941, would be $7.282, and thus the value of an annuity of $100,000 would be $728,200.

[38] An alternative method of division would be the use of the date of the future judicial decree of division rather than December 11, 1941. Another disposition might be to permit the defendant to retain the corpus and the income during the life of the usufructuary and then return the corpus to the intervener. It is suggested that this Court, upon a decision that intervener is eligible to recover his share of the vested assets, may deem it appropriate to remand the case to the District Court for further proceedings on this question.

The evidence supporting the establishment and continuation of the usufruct *in rem* until 1942 is tenuous at best. A further extension of the interest to sole possession and complete power of disposition, admittedly in the absence of clear evidence to that effect (Fdg. 104, R. 84a), is a wholly unwarranted destruction of the intervener's property rights in a valid gift found by the Court to have been made for his financial provision (Fdgs. 18, 104, R. 63a, 84a). This is particularly true when it is considered that the Court also found that the parents, far from exercising such complete rights, never demanded or received any income from their usufruct (Fdgs. 53, 104, R. 70a, 84a).

(b) *Intervener's right to 20% of the income.*—The Court below concluded its opinion with the statement that it was bound by the statement in this Court's former opinion that intervener had merely a contract right to receive from his parents 20% of the income from the property received by them (R. 59a; Concl. 13, R. 87a). The Court below made no finding of German law on this point either in the former findings or in the additional findings. This Court's statement (R. 58a-59a) that intervener had only a contract right against his parents for 20% of the income was not based on any evidence or finding of German law but solely on this Court's reading of the face of the agreement of 1931 (App. 91). The Supreme Court in *Uebersee II* apparently did not adopt this view because it stated that "Fritz had the bare legal title and the right to 20% of the income from the property" (343 U. S. at 210). * * * "The interest of Fritz was wholly and in reality subordinate to Wilhelm's, except as to the right of Fritz to receive 20% of the income from the usufructuary property" (343 U. S. at 211). On this inconclusive record the intervener took the position on the trial below that this Court's view, based solely on the language of the agreement, was subject to further consideration upon evidence and findings of German law and offered the testimony of a German law expert, Dr. Ulrich Hoche, that under German law the gift agreement established a usufruct only in respect of 80% of the income from the property and the owner of the shares retained a claim directly against Uebersee for 20% of the dividends (R. 529a-530a). Intervener's other German law expert, Dr. Heinrich Kronstein, testified that it was perfectly possible to interpret the gift agreement as meaning that 20% of the income goes directly to the intervener and that it was a question of interpretation of the intention of the parties (R. 118a). The defendant took the position that the former statement of this Court was binding on the trial Court and, in the alternative, offered the testimony of its German expert, Dr. Magdalena Schoch, who interpreted the agreement as meaning that intervener had only a contract claim against his parents for 20% of the income (R. 606a).[39] The intervener submits that he was not bound by the former statement of this Court in the absence of evidence or findings upon the former trial and the trial Court should have made findings of fact of the German law and an independent determination on this issue, and its failure to do so is reversible error.

On this point intervener concludes that application of *res judicata* has deprived him of a trial on the two issues of his innocence or taint as a stockholder and of his interest in the vested property which should be based on findings of fact of applicable Swiss law.

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[39] The distinction between a direct interest of intervener in 20% of the income and a mere contract claim against his parents for 20% of the income is legally important because of the provision of §34(a) of the Act that debt claims allowed against vested property shall include only claims of citizens or other natural persons resident in the United States "who have not during the war been interned or paroled pursuant to the Alien Enemy Act," as intervener was. Thus intervener is barred from asserting a contractual claim against the vested property.

IV.

Denial of recovery to intervener takes his property in violation of the Fifth Amendment.

Intervener is a friendly alien, a citizen of Liechtenstein and not a citizen of Germany, and at no time during the war was he present in enemy territory. The Fifth Amendment requires that the Act be construed to afford a friendly alien a remedy for return of vested property which is not enemy property. *Guessefeldt* v. *McGrath,* 342 U. S. 308, 319; *Silesian-American Corp.* v. *Clark,* 332 U. S. 469; *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 81; *Stoehr* v. *Wallace,* 269 Fed. 827 (C. A. 2), affirmed 255 U. S. 239. Section 7(c) of the Act makes such an action as this under §9(a) the exclusive remedy. *Pflueger* v. *United States,* 73 App. D. C. 364, 121 F. 2d 732, cert. den. 314 U. S. 617; *Escher* v. *United States,* 68 Ct. Cl. 473, cert. den. 281 U. S. 752; cf. *Uebersee I* (332 U. S. 480, 487-8). The confiscation of the property of intervener, a neutral citizen, leaves him in a worse position than that of an enemy national who commonly is given the protection of a treaty obligation of his government to compensate him for confiscated property.[40] The lack of any such protection of a neutral citizen emphasizes the necessity of giving him the full protection against confiscation of his property without just compensation.

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[40] After World War I in Article 297(i) of the Treaty of Versailles Germany undertook to compensate "her nationals" in respect of their property retained by the Allied States (quoted in *Klein* v. *Palmer,* 18 F. (2d) 932, 933 (C. A. 2)). After World War II similar provisions were included in the peace treaties with Bulgaria (Art. 25), Hungary (Art. 29), Italy (Art. 79), and Roumania (Art. 27) (1947 U. S. Cong. Serv. 2407, 2429, 2321, 2455). No peace treaty with Germany has yet been executed. One of the Bonn Agreements, the Convention on the Settlement of Matters Arising Out of the War and the Occupation executed on May 26, 1952, provides in Chapter Six—Reparation Article 1, that the problem of reparation shall be settled by peace treaty or earlier agreement and that pending final settlement, the following provisions shall apply. Article 5 provides that the Federal Republic shall ensure that the former owners of seized property shall be compensated (Senate Doc. No. 11, 84th Cong., 1st Sess., p. 103).

CONCLUSION

The judgment should be reversed and intervener should be held to be eligible to recover as his proportionate share of the vested assets all of the assets except that part which represents the value of 80% of the estimated net income for the life of the usufructuaries. In the alternative the case should be remanded for a new trial of the two issues of intervener's eligibility and his proportionate share of the property without binding him by the findings and rulings made on the trial of plaintiff corporation's separate cause of action.

Respectfully submitted,

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APPENDIX

GIFT AGREEMENT

(Plaintiff's Exhibit 5 on former trial, R. I. 1805-7)

Ruesselsheim, October 5, 1931

I, the undersigned Geheime Kommerzienrat Dr.ing.h.c. Wilhelm von Opel, declare that my property and the property of my wife Marta, nee Bade, are community property. Shares numbered 1 to 600 of the Adam Opel Aktiengesellschaft in Ruesselsheim, Main, having a par value of RM 6,000,000.00 (six million), are part of our community property. It is our common desire that these stocks remain with the male line of our family in order to preserve a personal connection between the bearers of the name of Opel and the work of our father Adam Opel.

In view of the premises I, with the consent of my wife, make a gift from our community property to my son Fritz von Opel of the shares owned by us and mentioned above, of the Adam Opel Aktiengesellschaft in Ruesselsheim, Main, Nos. 1 to 600, having a par value of RM 6,000,000.00 (six million). These stocks are deposited at present with the bank.

I, the undersigned Fritz von Opel, accept the gift.

I, Wilhelm von Opel, herewith transfer title to these shares to our son Fritz von Opel by assigning to him our claim for the delivery of these shares to us.

The usufruct in the shares is not assigned to Fritz von Opel. It remains with Wilhelm von Opel and his wife, hereafter called the parents Opel, until the death of the survivor of them. However, 20% of all dividends and interest received will accrue to Fritz von Opel.

If the parents Opel should predecease Fritz von Opel, the above described gift shall be considered as an advancement and shall be deducted from his share in such property as might be inherited by him or his sister, Mrs. Elinor Sachs, nee von Opel, or in case of her prior death, by her issue.

For this purpose the value of the shares shall be fixed as the value at the time when the duty to account for the advancement arises.

If this value is higher than the present value, the higher value shall apply, if it is lower, then the lower value.

In the event that the parents Opel shall not have drawn in full or in part the income from the shares accruing to them by virtue of their usufruct, the advancement to Fritz von Opel shall be deemed to have increased by the income not drawn and he shall be accountable therefor.

If the shares should be sold or exchanged against other property the proceeds from such sale or the property taken in exchange shall be substituted for the shares, after the usufruct of the parents Opel has been safeguarded. All provisions stipulated above will then fully apply to such substituted property.

If Fritz von Opel predeceases his parents without leaving legitimate issue, the gift executed by this document will become void. The stocks or the property substituted therefor including the income accrued but not drawn will then revert to the parents Opel or the surviving parent.

sgd. Fritz von Opel　　　sgd. Dr. Wilhelm von Opel

I, the wife Marta von Opel, nee Bade, agree to the above agreement.

sgd. Marta von Opel nee Bade

No. 13,265

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit

FILED SEP 4 1956

Joseph W. Stewart
CLERK

FRITZ VON OPEL, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General, as Successor to the Alien Property Custodian, APPELLEE

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE HERBERT BROWNELL, JR., ATTORNEY GENERAL

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QUESTIONS PRESENTED

1. Is appellant, the alleged beneficial owner of all of the stock and the legal owner of 97% of the stock of plaintiff Uebersee Finanz-Korporation which has been adjudged to be enemy tainted by reason of enemy ownership and control of said 97% of the stock, an "innocent stockholder" entitled to recover herein under the decision in *Kaufman* v. *Societe Internationale,* 343 U.S. 156?

2. Is appellant, as a transient or sojourner in the United States during the war, by reason of his activities in expediting bauxite production in Hungary, negotiating contracts for the shipment of such bauxite to Germany during the war, and in appointing agents to carry on and supervise bauxite production for him and in his name during the war, resident outside the United States and thus an enemy barred from recovery herein because doing business within enemy territory?

3. Is appellant an enemy by reason of enemy taint and thus barred from recovery herein on evidence demonstrating that he acted for and on behalf of and as an agent of enemy nationals?

4. Do the principles of *res judicata* properly apply to determinations of issues made in prior litigation which was controlled by appellant and in which he had a proprietary or financial interest?

5. Does the Constitution prohibit the confiscation of property of appellant, an enemy under the Trading with the Enemy Act, merely because he was in technical form a citizen of Liechtenstein, a neutral country?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,265

FRITZ VON OPEL, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General, as Successor to the Alien Property Custodian, APPELLEE

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE HERBERT BROWNELL, JR., ATTORNEY GENERAL

COUNTER STATEMENT OF THE CASE

Proceedings Below

This is an action brought in the District Court for the District of Columbia pursuant to Section 9(a) of the Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App. §9(a), for the recovery of certain properties vested by the Alien Property Custodian [1] pursuant to that Act. The properties sued for consist of stock interests in several American corporations and an interest in a contract. These properties were vested on various dates in 1942.

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[1] By Executive Order 9788, October 14, 1946, 11 F.R. 11981, the authority, rights, privileges and powers were transferred to the Attorney General. Thereafter, by appropriate orders of substitution Tom C. Clark, Attorney General, was substituted for defendant James E. Markham, Alien Property Custodian. By further orders of substitution Mr. Clark's successors in office have been made parties defendant in turn. In this brief, the term "Custodian" shall be used interchangeably to refer to the former Alien Property Custodian and to the Attorney General as his successor.

The original complaint was filed by appellee Uebersee Finanz-Korporation, A.G., and on January 24, 1945 the defendant moved to dismiss the complaint for failure to state a claim because it appeared that the plaintiff was a national of a foreign country whose property the Custodian was authorized to vest under the Trading with the Enemy Act. The motion was granted and judgment of dismissal was entered on September 21, 1945. This Court reversed, one judge dissenting, 81 U.S. App. D.C. 284, 158 F. 2d 313, and the United States Supreme Court affirmed the judgment of this Court, 332 U.S. 480, holding that since the complaint alleged that the plaintiff corporation was free from enemy taint, it stated a cause of action.

Upon remand to the District Court, the defendant filed his answer generally denying the material allegations of the complaint. After extended trial before Chief Judge Laws (see App. 89a),[2] an opinion, 82 F. Supp. 602, and findings of fact and conclusions of law (App. 60a) were filed and judgment for the defendant was entered May 6, 1949. Upon appeal by the plaintiff, this Court affirmed, one judge dissenting, 88 U.S. App. D.C. 182, 191 F. 2d 327; 89 U.S. App. D.C. 167, 196 F. 2d 557, and on writ of certiorari the United States Supreme Court affirmed unanimously, 343 U.S. 205. The Supreme Court, however, although affirming the judgment in all other respects, vacated the judgment and remanded the case to the District Court for further proceedings to consider the rights of the present appellant, Fritz von Opel, in view of the Court's decision in *Kaufman* v. *Societe Internationale,* 343 U.S. 156, decided the same day, in which the Court had held that an innocent stockholder in a neutral corporation might intervene in an action under Section 9(a) of the Trading with the Enemy Act to assert his rights to recover a proportionate part of the vested assets of a neutral corporation.

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[2] "App." references are to the Joint Appendix.

Upon remand, appellant Fritz von Opel was permitted to intervene (App. 2a) and filed his complaint (App. 4a). The defendant, now appellee Herbert Brownell, Jr., filed his answer (App. 7a). Certain intervener defendants also filed an answer in which they admitted the allegations of the present appellant's complaint (App. 9a). Pursuant to motions made by appellee in pretrial proceedings, the Court below entered two orders which are challenged on this appeal. By its opinion of May 28, 1954, 121 F. Supp. 420 (App. 21a) and order of June 18, 1954 (App. 32a), the District Court declared inadmissible upon the further trial of the action any evidence which would contradict or vary the findings of fact and conclusions of law previously entered, except that both parties were permitted to offer evidence supplemental to such findings and conclusions on the issues of appellant's enemy status, enemy taint and the value of his severable interest in the property. This opinion and order were based upon the view that the principles of *res judicata* were applicable to appellant, since he had controlled the pretrial litigation and had a proprietary or financial interest therein. Subsequently, by its opinion of December 20, 1954, 127 F. Supp. 42 (App. 34a) and order of January 4, 1955 (App. 36a) the District Court determined that the value of appellant's severable interest in the property must be determined by German law and not by Swiss law as claimed by appellant.

Thereafter, a further trial was had before Chief Judge Laws who subsequently filed an opinion, 133 F. Supp. 615 (App. 37a), findings of fact and conclusions of law (App. 72a) and again entered judgment for the defendant on November 22, 1955 (App. 89a). Intervenor Fritz von Opel filed a notice of appeal on January 13, 1956 (App. 91a).

THE FACTS

Appellant's statement of facts, by omitting parts of the findings of fact and numerous important items of evidence or by referring to them only by passing reference, attempts to create the impression that the opinion, the findings of fact and conclusions of law of the District Court were based upon wholly inadequate evidence. Moreover, by rearranging the facts to fit his own arguments rather than by following the treatment of such facts in the opinion and findings of fact of the District Court, appellant has confused the issues presented. In order that this Court may view the facts in their proper perspective, and as dealt with by the District Court, we find it necessary to make a fairly extensive counter statement. We agree with appellant, however, that for purposes of clarity, the discussion of the facts should be divided into two parts, namely, a statement of the facts as found by the District Court and affirmed on appeal after the first trial, and a statement of facts as found by the District Court upon the trial of the issues raised by the present appellant's complaint in intervention.

A. *The Facts as Established After the First Trial*

There is no dispute that plaintiff Uebersee Finanz-Korporation is a Swiss corporation and was, prior to vesting, the owner of record of the properties in suit. The sole question presented on the first trial was whether it was owned or controlled by enemies and was, therefore, itself an enemy or enemy tainted within the meaning of the Supreme Court's decision on the first appeal, *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480. It was also undisputed that the beneficial ownership and control of plaintiff Uebersee Finanz-Korporation rested in one or more members of the von Opel family. Uebersee Finanz-Korporation contended that legal title to 97 out of 100 shares of its stock was held by Fritz von Opel and that the 3 remaining shares were held by directors as qualifying shares, but beneficially owned by Fritz von Opel, who was domiciled in Switzerland. It was contended that Fritz von Opel was not an enemy and that consequently Uebersee was not an enemy. The defendant contended, and the District Court found, that control and substantial beneficial ownership of plaintiff Uebersee was held by Wilhelm and Marta von Opel, the parents of Fritz von Opel, who were citizens and residents of Germany and hence enemies under the Trading with the Enemy Act. The District Court held that this ownership and control by enemies constituted enemy taint of plaintiff Uebersee within the meaning of the Supreme Court's decision on the first appeal (Concl. 4, App. 71a). The District Court also held that the circumstances under which Fritz von Opel acquired Liechtenstein citizenship, his attachment to and sympathy for Germany, and plaintiff Uebersee's ownership of a Hungarian corporation which mined bauxite for the benefit of Germany, were additional elements of enemy taint (Concl. 5, App. 71a). The conclusions and judgment of the District Court were affirmed by this Court, 88 U.S. App. D.C. 182, 191 F. 2d 327; 89 U.S. App. D. C. 167, 196 F. 2d 557, and by the Supreme Court, 343 U.S. 205. These conclusions rested briefly on the following facts:

In 1929 General Motors Corporation purchased 80 per cent of the stock of Adam Opel, A.G., a German corporation engaged principally in the manufacture of automobiles. Wilhelm and Marta von Opel retained 10 per cent of the stock, or 600 shares, subject to an escrow agreement with General Motors Corporation (Fdg. 12, App. 62a). After 1929 Fritz von Opel ceased to reside in Germany and lived in the United States, Belgium and Switzerland and in 1934 he became a Swiss domiciliary (Fdg. 6, App. 60a). In order to be able to obtain payment for the 600 shares of Adam Opel, A.G. stock in gold or American currency instead of Reichsmarks under applicable German foreign exchange control laws, Wilhelm and Marta von Opel deemed it desirable to transfer said shares to a non-resident of Germany within the meaning of those laws (Fdgs. 15, 16, 18, App. 62a, 63a). Wilhelm and Marta von Opel thus on October 5, 1931 executed in Germany a deed of gift to Fritz von Opel, a non-resident of Germany, transferring to him the remaining 10 per cent of Adam Opel, A.G. stock (Fdg. 17, App. 62a). Under such deed of gift, Fritz von Opel was not given absolute ownership of the shares, but it was agreed that Wilhelm and Marta von Opel should have a usufruct in the shares or any property received in exchange therefor (Fdg. 32, App. 65a; Pl. Ex. 5, Appellant's brief, p. 91). The gift instrument provided as follows:

> The usufruct in the shares is not assigned to Fritz von Opel. It remains with Wilhelm von Opel and his wife, hereafter called the parents Opel, until the death of the survivor of them. However, 20 percent of all dividends and interest will accrue to Fritz von Opel.

Under German law such a usufruct could not be created until the owner delivered possession or co-possession of the usufruct property to the usufructuary (Fdg. 34, App. 65a), and such delivery was not made at the time of gift (Fdg. 33, App. 65a) thereby leaving Wilhelm and Marta von Opel with only a claim for the establishment of the usufruct. Shortly thereafter on October 17, 1931 Fritz von Opel, acting as attorney-in-fact for his father, sold the 600 Opel shares to General Motors Corporation for American currency and securities (Fdg. 19, App. 63a). After other financial transactions the proceeds of this sale were transferred to Uebersee, which invested them in certain corporations and other assets in the United States and elsewhere, including the properties in suit (Fdgs. 20, 21, App. 63a). On or before June 7, 1935, Fritz von Opel placed 97 of the 100 shares of Uebersee in a safe deposit box in a Swiss bank and delivered the key to one Hans Frankenberg as agent for his father, Wilhelm von Opel, with the understanding that Frankenberg represented Wilhelm von Opel (Fdgs. 37, 38, App. 66a). Such delivery of the key constituted valid delivery of the usufruct property to the usufructuary and the usufruct then and there came into existence (Fdg. 42, App. 67a). Under German law a usufruct is an *in rem* right in property. The usufructuary has the right to the enjoyment of the property and the income therefrom, to copossession of the property with the legal owner, to a voice in the management of the property, to prevent disposition of the property and in the case of shares possibly the right to vote such shares (Fdg. 52, App. 69a).

In addition to the provisions of the gift agreement itself, however, there were additional understandings between the parties. Mr. Frankenberg was made managing director of Uebersee at the request of Wilhelm von Opel in 1932 (Fdg.

39, App. 66a) and controlled the major policies of the corporation until the date of vesting in 1942 (Fdgs. 40, 43, App. 66a, 67a). As managing director he was at all times the agent of Wilhelm von Opel and controlled the investments and activities of Uebersee as such agent (Fdgs. 41, 43, App. 67a). From 1932 until the date of vesting appellant Fritz von Opel was engaged in activities on behalf of Uebersee and such activities were carried on under the direction and guidance of his father Wilhelm von Opel or his father's agent Frankenberg (Fdgs. 44, 45, App. 67a, 68a).

Thus, although Fritz von Opel was entitled to co-possession of the usufruct property and to a voice in its management and disposition, the rights of possession, management and disposition were conferred exclusively upon his father or his father's agent Frankenberg. This usufruct was never thereafter waived or abandoned by Wilhelm or Marta von Opel. Moreover, in litigation instituted against the Federal Reserve Bank of New York to recover possession of $1,250,000 in United States gold pieces which had been purchased by or on behalf of Uebersee in 1933 (*Uebersee Finanz-Korporation, A.G.* v. *Rosen* (S.D.N.Y. 1935), affirmed, 83 F. 2d 225 (C.A. 2), certiorari denied, 298 U.S. 679), Fritz von Opel in an affidavit stated that "naked title only to the shares was transferred to me" and that the reservation of a usufruct "left with me a mere legal title plus 20 per cent of the dividends and interest" (Def. Ex. 8, Former App.[3] 2000, 2001). In a memorandum filed with the District Court in that case, Uebersee Finanz-Korporation stated that the usufruct "effected a partition of ownership such that Fritz von Opel, although holder of legal title, was deprived of the beneficial enjoyment of the gift during the lifetime of his parents'' and that ''the entire beneficial enjoyment * * * would inhere in Wilhelm and Marta von Opel * * * while * * * only a naked legal title analagous to trust or custody would remain in Fritz von Opel.'' (Def. Ex. 8, Former App. 2072, 2084). In a footnote to the last quotation, Uebersee Finanz-Korporation further significantly stated:

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[3] The Record on Appeal on the previous appeal to this Court (No. 10,464) has been redesignated by agreement of the parties as part of the Record on the present appeal. A major part of such Record was printed as the Joint Appendix on the previous appeal. For convenience of the Court, therefore, the contents of that Record are referred to herein by the page numbers of the former Joint Appendix and such references are designated as "Former App.".

> The 20% of dividends and interest granted Fritz von Opel out of the usufruct by the deed of gift is a grant out of the reserved estate, proceeds from the usufructuary, and does not give Fritz von Opel any part of the beneficial use and enjoyment.

In addition to the enemy taint of plaintiff Uebersee by reason of enemy ownership and control, further evidence of enemy taint was also found to exist in Uebersee's relationship with Transdanubia Bauxite, A.G., a Hungarian corporation mining bauxite in Hungary, and in the enemy taint of Fritz von Opel. As to the former, the Court found that Uebersee owned all of the stock of the Hungarian corporation (Fdg. 22, App. 63a; Concl. 5, App. 71a), in which it had invested almost 200,000 Swiss francs up until 1942 (former App. 727-729; Def. Ex. 70, Former App. 2251). A state of war between the United States and Hungary existed from and after December 13, 1941 (Fdg. 31, App. 65a), and Uebersee held the shares of Transdanubia on its books throughout the war (Fdg. 28, App. 64a). It never took any steps to sever its relationship (Fdg. 30, App. 64a); to the contrary, in 1940, when Transdanubia needed a loan from a Hungarian bank, Uebersee caused a Swiss bank to guarantee the loan and itself deposited the necessary 32,000 francs collateral (Fdgs. 23-25, App. 64a). At quarterly periods until September, 1942 the loan was extended at the request of Uebersee until repaid by Transdanubia in November, 1942 (Fdgs. 26, 27, App. 64a).

Fritz von Opel, for Uebersee, made several trips to Hungary in 1939 to expedite bauxite production (Former App. 893, 894; Def. Exs. 76, 93, 95, Former App. 2262, 2286, 2288) and was active in Transdanubia's affairs and its relationship with Giulini Bros., a German aluminum manufacturer which purchased the bauxite (Def. Exs. 76-82, 92-94, 96, 97, Former App. 2262-2271, 2285-2287, 2294, 2296). As the result of negotiations carried on by Fritz von Opel in Hungary in November, 1939 (Former App. 893, 894, 1641; Def. Ex. 93, Former App. 2286), Transdanubia entered into a contract whereby it agreed to deliver 100,000 tons of bauxite to Giulini Bros. in 1940, 1941 and 1942 (Def. Ex. 97, Former App. 2296). Shipments under this contract were made through December, 1941 (Fdg. 31, App. 65a; Def. Ex. 90, Former App. 2282) and there is no suggestion that such shipments did not continue through 1942 as required by the contract.

Inasmuch as this case involved the interests of several persons some of whom were clearly enemies and the other a neutral, the District Court deemed it appropriate to inquire into "possible enemy tendencies of the neutral" (82 F. Supp. 606). It found further evidence of enemy taint in the personal status of Fritz von Opel based particularly upon the unusual circumstances of his acquisition of Liechtenstein citizenship. The Court found that while after 1929 Fritz von Opel spent a large part of his time outside of Germany, his roots remained firmly planted in that country, and it was not until November, 1939 that he took steps to change his citizenship (82 F. Supp. 606). He acquired this citizenship for a payment of $10,000, although he had never been in Liechtenstein for more than a few hours (Fdgs. 7, 8, App. 61a; 82 F. Supp. 606). This acquisition of citizenship was accomplished under a waiver of the residence requirements provided by law and without taking an oath of allegiance (Fdgs. 8, 9, App. 61a; 82 F. Supp. 606). In short, the Court concluded that his Liechtenstein citizenship was a mere "technical form". On the basis of his statements and actions between 1939 and 1941, as disclosed by the record, including his professed willingness to speed up bauxite production for the benefit of the German war economy (82 F. Supp. 606), the District Court found that Fritz von Opel had a continued interest in the welfare and sympathy for Germany (Fdg. 10, App. 61a; Cf. Fdg. 64, App. 73a).

The foregoing facts led this Court, on the previous appeal, to conclude "This case does not involve a diluted 'taint'; it involves the ownership by enemy nationals of the economic benefits of American business" (88 U.S. App. D.C. 182, 183, 191 F. 2d 327; 89 U.S. App. D.C. 167, 169, 186 F. 2d 557, 558). In unanimously affirming the judgment of this Court and the District Court, the Supreme Court described these facts as follows:

> However, from the facts found, it is clear that petitioner [Uebersee] for all practical purposes was, to the extent of 97%, largely owned, managed, used, and controlled by Wilhelm von Opel, a national of Germany. The findings demonstrate that petitioner was a corporate holding company acquired for the purpose of enabling Wilhelm to control and use his property as he saw fit. His interest was paramount and controlling. * * * Petitioner was neutral in name only. Its enemy taint was all but complete because of the predominant influence and control of Wilhelm. Wilhelm had and used the substance, while Fritz had the bare legal title; and such rights as this gave Fritz, he exercised or failed to exercise in complete subordination to the will of his father.
>
> * * * * *
>
> As the District Court said, it would be difficult "to find a stronger case of enemy taint in vested property short of full ownership by an enemy than exists in this case. The neutral aspect of ownership in the property is insignificant * * *." [343 U.S. 211, 212.]

B. *The Facts as Established After Appellant's Intervention*

After the Supreme Court's affirmance of the judgment of this Court against Uebersee and its remand of the case for consideration of the rights of Fritz von Opel in the light of its opinion in this case and its opinion in *Kaufman* v. *Societe Internationale, supra,* Fritz von Opel was permitted to intervene as a party plaintiff and filed his complaint in intervention (App. 4a). This complaint alleged that he was the beneficial owner of all of the shares of Uebersee Finanz-Korporation, that he was not an enemy or ally of enemy and that he was entitled to the return of all of the vested assets or that part of such assets to which the Court determined he was entitled. Appellee's answer (App. 7a) denied these allegations and in addition pleaded as an affirmative defense that appellant Fritz von Opel was bound by the decisions of the District Court, this Court and the Supreme Court, theretofore entered in the action, on the ground that he had controlled the prior litigation on behalf of Uebersee and that he had an interest therein.

On the basis of this defense, appellee filed a motion before trial under Rule 16 for an order determining that appellant could not introduce evidence which would vary or contradict the findings and decisions of the courts previously made. In such motion, appellee urged that appellant had controlled the prior litigation by retaining counsel, assisting in pretrial and trial proceedings and on a motion for a new trial, by appearing as the principal witness for the plaintiff at the prior trial, and by authorizing prosecution of the previous appeal to this Court as plaintiff's representative. These allegations were unchallenged and undisputed by appellant. Appellee further urged that appellant had a proprietary interest in the prior litigation by reason of his asserted interest in the stock of Uebersee Finanz-Korporation whose assets were in suit. The District Court stated:

> The record shows active control, participation and assistance to protect his asserted proprietary and financial interests. This establishes clearly his privity with plaintiff in the original action. (121 F. Supp. 425, App. 28a).

The Court therefore concluded that the doctrine of *res judicata* was applicable to issues previously determined in the original action. It permitted additional evidence to be introduced on the issues of appellant's enemy status, enemy taint, and the value of his severable interest in the property in order that the record would be complete (121 F. Supp. 426, App. 31a, 32a). This opinion and order of the District

Court are now challenged by appellant and are discussed *infra,* pp. 69-81.

Following this decision, appellant contended that the value of his severable interest under the usufruct should be determined under Swiss law, since the shares of Uebersee were located in Switzerland. Disputing this view, appellee filed a further motion under Rule 16 to have the Court determine that such interest should be evaluated under principles of German law inasmuch as the rights of the parties to the usufruct had previously been determined under German law and such determination of choice of law was binding upon appellant under *res judicata.* The District Court adopted this view and determined that German law should be applied exclusively in determining the value of appellant's severable interest (127 F. Supp. 42, App. 34a, 36a).

The action then proceeded to trial for a second time before Chief Judge Laws and at the conclusion thereof, the Court filed its opinion (133 F.Supp. 615, App. 37a) and a number of findings of fact and conclusions of law (App 72a).[4] The District Court's opinion, which is closely followed by the findings of fact and conclusions of law, is subdivided into three parts, namely, appellant's enemy status, appellant's enemy taint and the value of his severable interest. The opinion and findings of fact are based in part upon the facts as found after the first trial which are summarized in the preceding section of this brief.

1. *Enemy Status*—The issue presented to the District Court under this heading was whether or not appellant was resident outside the United States and doing business within enemy territory and was therefore an enemy ineligible to recover under Sections 2 and 9(a) of the Trading with the Enemy Act.

On the question of residence outside the United States, Chief Judge Laws found that appellant entered the United States in May, 1940 under a visitor's visa which permitted him to remain in this country for six months, and that this visa was extended for additional six month periods until February, 1942, when appellant was interned as an enemy alien (Fdgs. 57, 58, App. 72a). After appellant's release from internment in May, 1945, and until he was permitted voluntarily to depart for Switzerland in 1950, appellant lived in New York (Fdg. 59, App. 72a). In 1934, 1936 and 1937 appellant initiated steps to immigrate into the United States, but never did in fact immigrate; when his wife went to Cuba in 1941 to re-enter the United States for permanent residence he did not accompany her because his papers were incomplete and he feared he might not be permitted to return to this country (Fdgs. 59, 61, App. 72a, 73a). Between December 1930 and August 1939 appellant made numerous trips to Germany, totaling about ten per cent of the time; these trips were made primarily to attend to financial investments and business activities of his father, Wilhelm von Opel, and to participate in sporting events (Fdg. 60, App. 72a). His Liechtenstein citizenship, acquired in November 1939 under the circumstances previously noted, was a citizenship of convenience and the Court found that he had no attachment, patriotism, sentiment, interest or loyalty to Liechtenstein (Fdg. 62, App. 73a). It also found that appellant continued to have an interest in the welfare of and sympathy for Germany; that he was not a vigorous supporter of the National Socialist regime in Germany insofar as it conflicted with his concern to protect his financial investments and his person; that he was friendly socially with persons prominent in the German government, took pride in the prowess of the German army and extended his aid to the German government in the early part of World War II (Fdg. 64, App. 73a). On the basis of these facts and the facts previously noted concerning appellant's personal status, the Court found and concluded that appellant was in the United States after 1940 as a visitor, transient or sojourner with no settled or fixed abode in the United States, was not a resident of the United States and was resident outside the United States (Fdg. 63, App. 73a; Concl. 10, App. 86a).

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[4] For convenience of reference, the additional findings of fact and conclusions of law are numbered to follow those made at the conclusion of the first trial.

As stated in the foregoing section of this brief, Transdanubia Bauxite, A.G. was a Hungarian corporation wholly owned by plaintiff Uebersee and mining bauxite in Hungary to be shipped to Germany. The Court at this trial found that from 1935 to and including the year 1941 appellant managed and controlled the policies and affairs of Transdanubia Bauxite, A.G. in the course of numerous trips to Hungary to and including November 1939, and through the appointment by appellant of agents in Hungary to represent him in conducting the affairs of such corporation (Fdgs. 65, 66, App. 73a, 74a). In 1936, appellant appointed a Dr. Salusinszky of Hungary as his agent to control the operations of Transdanubia Bauxite, A.G. by delivering to Dr. Salusinszky powers of attorney authorizing the latter to represent appellant and to sign in appellant's name for Transdanubia Bauxite, A.G. (Fdg. 67, App. 74a). Upon Dr. Salusinszky's death in the summer of 1939, appellant appointed a Dr. Timar of Hungary as his agent to control the management and operations of Transdanubia Bauxite, A.G. by delivering to him, in August or September 1939, powers of attorney in the same form as those previously delivered to Salusinszky. These powers of attorney authorized Timar to represent appellant and to sign in the name of appellant for Transdanubia Bauxite, A.G., such actions by Timar to be performed on behalf of plaintiff Uebersee (Fdg. 69, App. 74a; Def. Exs. 127, 129, App. 1036a, 1041a). Timar made regular and frequent reports to appellant on the activities and operations of Transdanubia Bauxite, A.G., negotiations with Hungarian government authorities and similar matters, and there was no evidence that the powers of attorney delivered to Timar were ever revoked (Fdgs. 70, 71, App. 75a). In November 1939, appellant went to Hungary in response to a letter received from Giulini Bros., the German aluminum manufacturer which purchased bauxite from Transdanubia, which stated that

> . . . in view of the mobility which you have as a German residing abroad, and in view of the funds at your disposal, you would do meritorious service for the raw-

> material supply of the German aluminum industry and the entire war economy of Germany if you would tackle with all your energy the resumption of production in the mines. (Fdgs. 72, App. 75a; Def. Ex. 81, Former App. 2270).

While in Hungary on this occasion appellant personally negotiated with representatives of Giulini Bros., and such negotiations resulted in the execution of a contract between Transdanubia Bauxite, A.G. and Giulini Bros., providing for the shipment of 100,000 tons of bauxite to Giulini Bros. until the end of 1942 (Fdgs. 31, 72, App. 65a, 75a). The District Court repeated its prior finding that Transdanubia Bauxite shipped bauxite to Giulini Bros. in December 1941 while the United States was at war with Germany and Hungary, and inferred that such shipments continued thereafter since the contract just referred to provided for shipments to the end of 1942 and in November 1942 Transdanubia Bauxite was able to repay the loan referred to in Findings 23, 24, 25 and 26 (Fdgs. 31, 73, App. 65a, 75a). The Court also found that although there was no evidence that Uebersee Finanz-Korporation, except through appellant, was doing business in Hungary after December 13, 1941, appellant's personal participation in bauxite production and the activities and welfare of Transdanubia Bauxite made his relationship to Transdanubia Bauxite more direct than that of Uebersee Finanz-Korporation and his father in whose interest he was acting (Fdg. 74, App. 76a.) The Court, therefore, concluded that:

> Contributing to the resources of the enemy through supervising and encouraging the production of essential war materials in one enemy country, for shipment to another enemy country, constitutes the doing of business in enemy territory within the meaning of Section 2(a) of the Act. The activities of Dr. Timar as agent under powers of attorney given him by Fritz von Opel are attributable to the latter. (133 F. Supp. 620, App. 43a; Concl. 10, App. 86a).

The Court concluded, in response to appellant's objection, that the issue of doing business was within the issues formulated at pretrial (133 F. Supp. 625, App. 54a).

2. *Enemy Taint*—In part II of his opinion below, dealing with enemy taint, chief Judge Laws first analysed appellant's contention that enemy taint may not be applied to individuals and concluded that such a contention was not in accordance with the Trading with the Enemy Act as interpreted by the Supreme Court (133 F. Supp. 621, App. 44a-46a). The District Court then considered the question as to whether appellant qualified as an innocent stockholder of Uebersee Finanz-Korporation under the Supreme Court's decision in *Kaufman* v. *Societe Internationale, supra,* and its decision in this case, as provided in the remand by that Court.

Chief Judge Laws took note of the fact that on the basis of his findings, the Supreme Court, in its prior opinion herein (343 U.S. 205), had determined that the property involved was owned, managed, used and controlled and in all ways handled by Wilhelm von Opel and his agent to use as Wilhelm saw fit, that Wilhelm's interest was paramount and controlling, and that appellant's interest was wholly and in reality subordinated to that of Wilhelm (343 U.S. 210, 211), Judge Laws therefore concluded that appellant was a means of protecting the interests of enemy nationals in the enemy tainted corporation Uebersee Finanz-Korporation. As stated in his opinion:

> Except for the vesting of the property by the Custodian through him enemy nationals would be able to claim and receive all the proceeds and benefits of the property ostensibly in his name. Through him enemy nationals might have available dollar exchange and other financial resources for use by the enemy in economic warfare against the United States. This the Act was intended to prevent. (133 F. Supp. 621, App. 46a, 47a).

The District Court therefore found that appellant, unlike the intervener in *Kaufman* v. *Societe Internationale, supra,* was not a mere innocent investor in a neutral corporation whose interests were hostile to the enemy management and who had no knowledge that the assets in his name were contributing to the resources of the enemy. To the contrary, the Court found that appellant held his interest in plaintiff Uebersee primarily on behalf of and for the benefit of enemy nationals, and thus concluded that he was not an innocent stockholder eligible to recover herein under the decision in *Kaufman, supra* (133 F. Supp. 622, App. 47a; Concl. 12, App. 87a).

But this was by no means all. Chief Judge Laws also considered the evidence showing appellant's activities as an agent of the enemy and enemy nationals and as an individual cooperating with the German government. The evidence at the first trial demonstrated that appellant's activities on behalf of Uebersee were largely carried on under the guidance and direction of his father, Wilhelm von Opel, or his father's agent (Fdg. 45, App. 68a), and that not only had appellant subordinated his interests in Uebersee to those of his father, but that such rights as his legal title gave him "he exercised or failed to exercise in complete subordination to the will of his father." (343 U.S. 210, 211). In addition to the prior findings relating to such activities, however, the Court made further findings based upon the abundant evidence introduced by appellee upon the present trial.

It found that between the years 1934 and 1939 appellant had no interest in any business enterprises in Germany, other than those of his father, and conducted little or no business activities in Germany other than as representative of his father (Fdg. 76, App. 76a). Appellant was nonetheless active in several business enterprises in Germany in those years as his father's representative. Wilhelm von Opel owned more than 60 per cent of the stock of Collet & Engelhard Machine Tool Factory, Inc. of Offenbach, Germany, which had average gross annual sales of eight to ten million Reichsmarks. Wilhelm von Opel was neither an officer nor a director of this corporation, but appellant, as representative and agent of his father, was made a director of the corporation in 1935 and remained such at least until 1940. In that capacity appellant supervised and controlled the business activities, policies and management of the corporation (Fdgs. 77, 78, 79, App. 76a, 77a). This supervision and control extended to numerous details, including production schedules, employment of managerial and other personnel, fixing compensation of officers, and approval of purchases and expenditures (Fdg. 79, App. 77a; Def. Exs. 137-143, App. 1067a-1092a). Appellant's activities in this respect were not limited to the periods during which he was in Germany, but were continued by him while in Switzerland as well (Def. Exs. 134-140, 142, 143, App. 1067a-1079a, 1090a, 1092a). Collett & Engelhard also owned all of the stock of another company known as Machine Factory Wiesbaden, Inc. of Wiesbaden, Germany, which was engaged in the manufacture of steel products, including cranes, elevators and radiators (Fdg. 80, App. 77a). Although appellant was neither an officer, director, nor stockholder of Machine Factory Wiesbaden, Inc., he nevertheless personally supervised and controlled its policies and management. In this corporation as well, appellant, whether in Germany or Switzerland, directed its operations, the expansion of its production facilities, the hiring of personnel and the fixing of their compensation (Fdg. 81, App. 77a; Def. Exs. 144-146, App. 1094a-1100a). As appellant himself stated, he was the representative of Wilhelm von Opel, the controlling stockholder of the parent company, Collet & Engelhard, and the management therefore listened to him (App. 338a). With respect to both of these companies, appellant saw to it that his ideas were accomplished either through the Board of Directors or otherwise (Def. Exs. 135-137, 139, 142-146, App. 1068a-1071a, 1077a, 1090a-1100a).

Appellant was also active in the affairs of the Wilhelm von Opel Property Administration Company and the Wilhelm von Opel Forest Administration Company. The Property Administration Company was a company with limited liability established in Germany in 1935 to acquire and hold the assets of Wilhelm von Opel. Its members were appellant and his sister Elinor von Opel, but these members were not entitled under the by-laws of the company, to claim any distribution of profits, and in such by-laws Wilhelm von Opel was named manager for life (Fdg. 82, App. 78a). Among the assets held by the Property Administration Company were all of the shares of the Forest Administration Company, another company with limited liability established to hold a large forest estate purchased by Wilhelm von Opel in 1935 or 1936 for three million Reichsmarks (Fdg. 83, App. 78a). Appellant, as representative and agent of his father, personally supervised the management of this estate, the cutting of timber and the raising of fish and animals thereon as well as the conduct of litigation involving this estate (Fdg. 84, App. 78a).

Appellant also occupied himself with advising his father on the investment policy which the latter should pursue and in particular with the investment of large sums of money by his father through the Union Bank of Darmstadt and Berlin, Germany. When this Bank became bankrupt in 1936, appellant acted as the general representative of his father, one of the largest creditors, in the bankruptcy proceedings which continued from 1936 at least until 1938 (Fdgs. 85, 87, App. 79a; Def. Ex. 125, App. 1029a). Most interestingly, shortly before this bankruptcy occurred, appellant in a letter to his father recommended that the latter purchase 7,500,000 Reischsmarks worth of German shipping shares and stated that the transaction should be carried out in order to demonstrate that both appellant and his father were willing to act in the interest of the German goverment at any time (Fdg. 86, App. 79a; Def. Ex. 123, App. 1015a).

Coming now to the outbreak of war in Europe in September 1939, there is one portion of the evidence which possibly overshadowed all of the rest. This evidence concerned appellant's activities and relationship with Hans Sigismund von Bibra, Counselor of the German Legation in Switzerland and leader of the German Nazi party in Switzerland and appellant's acquisition of Liechtenstein citizenship in 1939.

When war broke out in Europe in 1939, appellant became concerned that the United States might enter the war and that the assets of plaintiff Uebersee, now involved herein, might be seized by this Government during such war. Accordingly, he instructed his German attorney, Dr. Gros, to undertake negotiations with German government officials in Berlin to make arrangements whereby he could acquire a neutral citizenship for the duration of the war with the assurance that he could reacquire his German citizenship as soon as the emergency terminated (Fdgs. 88, 89, App. 79a, 80a; Int. Ex. 6, App. 825a). Such negotiations were in fact conducted by Dr. Gros who then reported to appellant the decision of the Berlin officials that the matter should be handled through the appropriate German diplomatic representatives, in this case officials of the German Legation in Switzerland (Fdg. 89, App. 80a; Int. Ex. 6, App, 825a). Having been so informed by his attorney, appellant requested and obtained an interview with Mr. von Bibra, the official occupying the positions above described, had several personal conversations with him in September, October and November, 1939 and addressed at least two letters to von Bibra on this subject (Fdg. 90, App. 80a; Int. Exs. 6, 7, App. 823a, 828a). In these conversations and letters, appellant informed von Bibra of the prior negotiations in Berlin and also expressed his fear that the assets of Uebersee Finanz-Korporation in the United States might be seized if this country were to enter the war (Fdg. 91, App. 80a; Int. Ex. 6, App. 824a). As appellant so aptly phrased it:

> While I hope to be able to obtain a release from the *British* authorities (by reason of the fact that the plantation[5] is owned by a Swiss corporation with exclusively Swiss stockholders) my lawyers are unanimously of the opinion that the safeguarding and cloaking measures taken will certainly not hold up for any length of time vis-a-vis the very thoroughly informed *American* authorities and that a seizure can be avoided only by my taking timely precautions which would permit me

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[5] This reference is to a coconut plantation in Tanganyika owned by Uebersee (App. 194a; Int. Ex. 6, App. 824a).

> to acquire a neutral citizenship in an emergency. (Italics in original.) (Int. Ex. 6, App. 824a; Fdg. 91, App. 80a)[6]

Appellant also informed von Bibra that although he had been active in business in the United States for the ten years preceding and although he could have become an American citizen at any time within the preceding five years, "it has gone against my grain for various reasons to relinquish my German citizenship which to me is the tangible expression of my ties to my homeland." (Int. Ex. 6, App. 825a; Fdg. 92, App. 81a). Appellant, therefore, proposed to von Bibra, as he had previously requested in Berlin, that he be permitted to relinquish his German citizenship for the duration of the war in order to preserve the assets of Uebersee Finanz-Korporation for the benefit of the German government and to prevent their seizure by the United States, with the assurance that upon the termination of the war his German citizenship would be restored (Int. Ex. 6, App. 825a; Fdg. 91, App. 80a).

In the conversations and interviews which followed this letter, appellant by his statements to von Bibra made it appear that upon the outbreak of war in Europe he had offered his services to the German government for any activities of whatever kind, although it was not his intention to render military service (Fdg. 92, App. 81a; Int. Ex. 7, App. 828a). In November, 1939, following these conversations with von Bibra and the letter above referred to, appellant received a letter from von Bibra advising that the necessary permission to acquire neutral citizenship had been granted. Such permission was granted, according to von Bibra, in view of appellant's broad offer of services to the German government, and particularly in view of appellant's unequivocal statement that such neutral citizenship was to be acquired only to preserve the assets in the United States (meaning those in suit) for the benefit of the German government and to prevent their seizure by the United States. This permission was made a matter of official record in the files of the German Legation (Fdg. 93, App. 81a; Int. Ex. 7, App. 829a).

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[6] The reference in this letter to Swiss stockholders is a reference to the purported sale of the stock of Uebersee Finanz-Korporation in 1936, which "sale" was reversed in 1941. This highly colorable transaction under which neither party received the proceeds of the "sale" and under which the situation remained exactly as before, is referred to again in appellant's present brief (pp. 82, 83). It was also urged upon this Court on the prior appeal and this Court's answer was as follows:

> Appellant says that the usufruct was disestablished in 1936, when the particular shares were sold and the essential copossession of them was thus lost. But it appears that the sale was a form only, conceded by appellant to have been for the purpose of tax avoidance, and the transaction was thereafter reversed; indeed it does not appear that the co-possession was ever actually disturbed. This was the view of the District Court, and we see no reason to disagree with it. (89 U.S. App. D.C. 167, 196 F. 2d 557, 558).

Appellant's contention that this exchange of correspondence with von Bibra was a sham, invented by von Bibra and himself to deceive the German government, was specifically repudiated as unworthy of belief by Chief Judge Laws in view of von Bibra's high position in the German diplomatic service and the Nazi party, in view of the fact that von Bibra's letter was prepared by a subordinate, and in view of the fact that appellant had previously been a complete stranger to von Bibra (133 F. Supp. 624, App. 51a).

At or about the same time, namely September, 1939, appellant also manifested his intention to be of service to the German government in a different but equally specific manner. On September 1, 1939, the date of the German invasion of Poland, the German Foreign Office sent a secret telegram to the German Legation in Switzerland requesting the latter to furnish the names of trustworthy Swiss citizens who could assist in making foreign exchange available to Germany in the event of war. The contents of this telegram were obviously communicated to appellant by von Bibra, for appellant promptly supplied the name of Dr. Wehrli, a Swiss banker, as a person who, if properly approached, would assist the German government within the meaning of the aforesaid secret telegram (Fdg. 94, App. 82a; Def. Exs. 155, 156, App. 1122a, 1123a).

The District Court, also under the subject of enemy taint, referred to the activities of appellant in his efforts to speed up production of bauxite by his Hungarian corporation, Transdanubia Bauxite, for shipment to Germany as further evidence of his cooperation with Germany. The facts relating to these activities have been set forth under "Enemy Status", *supra*.

Appellant's demonstrations of his willingness to cooperate with the German government and with German nationals did not end with the episodes recited. In February, 1941, he received a letter from the German Consulate in New York stating that the latter had received a coded telegram from appellant's father, Wilhelm von Opel, through diplomatic channels which appellant was requested to discuss in person (Fdg. 95, App. 82a; Def. Ex. 148, App. 1105a). Appellant, who was in Palm Beach, Florida, advised the Consulate that he could not come to New York, but that Mrs. von Opel would conduct such discussions on his behalf. She did so a few days later and was informed that the coded telegram concerned a request that appellant undertake negotiations with General Motors Corporation with respect to a possible repurchase of the Adam Opel, A.G. stock which General Motors had acquired in 1929 and 1931 (Fdgs. 95, 96, App. 82a; Def. Exs. 148, 149, App. 1105a, 1107a). Having been so advised by his wife, appellant then addressed a further letter to the German Consulate stating that he had consulted his attorneys on the matter and that they had advised him that he could not undertake such negotiations without registering as an agent of a foreign government. This opinion, he reported, was based upon the fact that such a transaction could not be consummated without the approval and cooperation of the German government. He nevertheless suggested that the Consulate send a telegram to his father stating that he was ready to conduct such negotiations, but that he would have to register in the United States under applicable law (Fdg. 96, App. 82a; Def. Ex. 149, App. 1107a). Without awaiting a reply, appellant immediately went to see John Thomas Smith, the General Counsel of General Motors Corporation, concerning this possible repurchase, but was informed that General Motors had no intention of selling (Fdg. 97, App. 83a; Def. Ex. 150, App. 1111a).

3. *The Value of Intervener's Severable Interest.*—Although the District Court concluded that appellant was barred from recovery by reason of the facts stated above, it nevertheless deemed it appropriate to enter findings on the value of his severable interest in the event that this aspect of the case might become decisive. Supplementing its previous findings on the nature of a usufruct under German law, the District Court found that the legal owner of property subject to a usufruct possesses those rights which have not been conferred upon the usufructuaries or reserved by them, and that a usufruct is a personal nontransferable right *in rem* which terminates upon the death of the usufructuary (Fdg. 100, App. 83a). The Court further found, in accordance with authoritative decisions of German courts, that in attempting to evaluate a usufruct under German law, it is appropriate to consider not only the legal incidents of a usufruct, but also the beneficial or economic ownership of the property under the circumstances (Fdg. 100, App. 83a). The District Court pointed out that in its prior opinion after the first trial it had found that Wilhelm and Marta von Opel possessed usufructuary and other interests in the stock of Uebersee Finanz-Korporation, referring to the control exercised by Wilhelm von Opel, or his agent Hans Frankenberg, over both Uebersee and appellant (82 F. Supp. 605; 133 F. Supp. 625, 626, App. 55a, 56a). The District Court properly noted that these findings had been affirmed on appeal.

Applying the test of beneficial or economic ownership to these prior findings and the determinations that Wilhelm von Opel had sole possession, control and power of disposition of the usufruct property, the District Court found that Wilhelm and Marta von Opel had full beneficial and economic ownership thereof, and that their interests were so dominant as to render the interest of appellant as legal owner valueless during the life of the usufruct (Fdgs. 101, 102, App. 84a; 133 F. Supp. 626, App. 56a). The District Court, however, rejected defendant's contention that because of this beneficial or economic ownership appellant had no recoverable interest in the property. It found that the survivorship rights of appellant were a future interest not cut off by the vesting of the property, and that even though Wilhelm and Marta von Opel, during their lifetimes, had an unlimited power of disposition over the property, the legal owner was entitled to the proceeds of the property remaining upon the termination of the usufruct; thus, appellant's rights as legal owner were not wholly destroyed (Fdgs. 103, 104, App. 84a; 133 F. Supp. 626, App. 57a, 58a).

The Court then found that under German law there was no direct authority governing the evaluation of a usufructuary interest, but that a German court would evaluate such an interest by analogy to the method of ascertaining the value of annuities and other life interests. This evaluation would be made under sound principles of accounting, taking into consideration the intention of the parties, and with the aid of German life expectancy tables as applied to appellant's parents and the estimated income to be derived from the property, as of December 11, 1941, the date of declaration of war between the United States and Germany (Fdg. 105, App. 85a; 133 F. Supp. 627, App. 58a).

As to the 20 per cent of the income claimed by appellant under the usufruct agreement, the District Court followed and adopted the previous determination of this Court that this was a mere contract right and not a right *in rem* (Concl. 13, App. 87a; 133 F. Supp. 627, App. 58a, 59a; 89 U.S. App. D.C. 170, 196 F. 2d 560). Since appellant had conceded that a mere contract right against his parents was not a recoverable interest in the property herein involved, the Court concluded that this interest was without value and could not be recovered in this action (Concl. 13, App. 87a; 133 F. Supp. 627, App. 59a).

STATUTES INVOLVED

Pertinent provisions of the Trading with the Enemy Act are set forth in the appendix to this Brief.

SUMMARY OF ARGUMENT

Appellant attempts to emphasize enemy taint as the primary basis upon which the District Court denied recovery herein. In doing so, appellant seeks to eliminate from the case the direct and compelling evidence of his efforts to conceal the property here involved under neutral ownership for the benefit of the enemy and to prevent its seizure by the United States, as well as his activities on behalf of the enemy. Appellant, however, in order to prevail in this action, must establish that he is an innocent stockholder of plaintiff Uebersee Finanz-Korporation and that he is not an enemy within any of the definitions of that term. The District Court found that he was not an innocent stockholder of Uebersee, that he was an enemy by virtue of doing business in enemy territory and that he was enemy tainted because he acted for and on behalf of and as an agent of the enemy and enemy nationals. No one of these grounds is of any greater legal significance than any other, and appellant must successfully negate all of them in order to prevail. Realizing that upon the abundance of evidence presented this becomes almost a hopeless task, appellant therefore attempts to create the impression that the questions of his status as an innocent stockholder or as an enemy because doing business in enemy territory are dependent upon the determination of enemy taint. Since these questions are independent, they are examined and discussed separately herein.

Turning first to the question of appellant's status as an innocent stockholder under the decision of the Supreme Court in *Kaufman* v. *Societe Internationale, supra,* we find that appellant holds legal title to 97 out of 100 shares of plaintiff Uebersee and claims beneficial ownership of all of the shares. Plaintiff Uebersee, on the other hand, has been adjudicated an enemy tainted corporation by reason of enemy ownership and control. It is difficult therefore to visualize any situation in which the person holding legal title to 97 per cent of the stock of an enemy tainted corporation can be an innocent stockholder thereof. Clearly, under the Supreme Court's decision in *Kaufman,* an innocent stockholder must be a person innocent of the dominant enemy ownership and control and with interests adverse to the enemy. Here, however, appellant held his legal title to the shares subject to the usufruct agreement with his parents. This agreement and the subordination of appellant's legal rights were the means whereby enemy ownership and control were able to flourish. Appellant, therefore, was not innocent of the enemy ownership and control, but was an integral part thereof. Nor did he have any interests adverse to those of the enemy. He is thus not an innocent stockholder of plaintiff Uebersee and may not recover herein under the terms of the remand of this case by the Supreme Court (Point I).

Section 2(a) of the Act defines an enemy as a person resident outside the United States and doing business within enemy territory. Appellant was an enemy within this definition and was barred from recovery herein. He was in the United States only as a transient or sojourner and left his place of residence in Switzerland only temporarily. During the war he was interned in the United States and was thus involuntarily detained here. Under such circumstances he was not resident within the United States, but resident outside this country. Appellant actively supervised and controlled the affairs and operations of Transdanubia Bauxite, A.G., a Hungarian corporation mining bauxite for shipment to Germany for the manufacture of aluminum. He expedited such bauxite production to aid the German war economy and negotiated a contract requiring the shipment of bauxite to Germany through the year 1942. He executed and delivered powers of attorney to an official of Transdanubia who was thereby empowered to act for appellant and to sign in appellant's name. In his capacity as agent of appellant, this official continued to control the operations of the Hungarian corporation and its production activities. These actions of the agent appointed by appellant are attributable to the latter, and appellant was therefore doing business in Hungary and thus an enemy barred from recovery. The issue of doing business was within the issues formulated at pretrial and there was no surprise to appellant by the introduction of evidence on this issue (Point II).

As determined by the Supreme Court on the first appeal in this case, the 1941 amendment of the Trading with the

Enemy Act necessarily expanded the concept of enemy to include all persons or corporations affected with an enemy taint. The definitions of enemy contained in Section 2 of the Act became "merely illustrative, not exclusionary." This expanded definition was necessary to meet the new concepts of economic warfare and to reach enemy interests masquerading under innocent fronts. Under this expanded concept of enemy status, appellant was enemy tainted because he acted for and on behalf of, and as agent of, the enemy and enemy nationals. Immediately upon the outbreak of war, he attempted to, and did, acquire a neutral Liechtenstein citizenship with the approval of the German government for the express purpose of preserving the assets now in suit for the benefit of Germany and to prevent their seizure by the United States. He offered his services to the German government during the war and in fact aided such government. Virtually all of his activities, whether on behalf of plaintiff Uebersee or otherwise, were undertaken as agent and representative of his father, an enemy national. Unless the concept of enemy taint is meaningless, these actions by appellant as agent of the enemy or enemy nationals constitute enemy taint and bar his recovery. (Point III).

By two orders entered prior to trial, the District Court determined that the doctrine of *res judicata* was applicable herein and that appellant was bound by the prior findings and decisions of the courts. This determination was inescapable in view of the fact that appellant had controlled the prior litigation and had a proprietary or financial interest therein. By reason of such control and interest, appellant was in privity with plaintiff Uebersee and was thus bound by the determinations of issues in the prior proceedings. The Supreme Court, by final judgment, having approved the findings previously made, appellant was not entitled to a second day in court to attempt to prove the opposite of what had been previously adjudicated. Appellant was properly permitted to adduce evidence of the value of his severable interest in the property, an issue not previously determined, and to adduce additional evidence as to his enemy status and enemy taint to make the record complete. He availed himself of this opportunity and cannot now complain. The second order, requiring German law to be applied to the evaluation of appellant's interest, was also correct as a matter of law. German law had previously been determined to be applicable to the usufruct; this determination of choice of law was as binding upon appellant as the determination of an issue of fact. (Point IV).

The findings of the District Court as to the method of evaluating appellant's severable interest in the property were supported by abundant evidence and therefore correct. The District Court was well justified, if not required, to take into account its prior determinations, as well as those of the Supreme Court on the previous appeal, that appellant's parents had full rights of control and disposition over the usufruct property and that such rights must be considered in evaluating appellant's interest. The District Court was also correct in adopting the prior determination of this Court that appellant's right to 20 per cent of the income of the usufruct property was a mere personal right against his parents and not a right *in rem.* Since this determination was specifically requested by plaintiff Uebersee on motion for clarification of this Court's opinion on the prior appeal in litigation controlled by appellant, it was binding upon him. Moreover, this determination accords with the representations of the parties and was supported by independent evidence. (Point V).

No constitutional question is presented under the Fifth Amendment, since Congress may constitutionally provide for the seizure of property of enemies or their adherents. Appellant's neutral citizenship, a mere matter of technical form, does not overcome the constitutional power to seize property of enemies, nor is such citizenship entitled to recognition by the United States under principles of international law. (Point VI).

ARGUMENT

I

Appellant Is Not an Innocent Stockholder and Therefore Has No Right of Recovery Herein

The Supreme Court, on the prior appeal, unanimously affirmed the decision of this Court and the District Court holding, among other things, that plaintiff Uebersee Finanz-Korporation was enemy tainted and ineligible to recover by reason of the enemy ownership and control by Wilhelm and Marta von Opel, *Uebersee Finanz-Korporation* v. *McGrath,* 343 U.S. 205. In view of the claim advanced by plaintiff Uebersee that Fritz von Opel, as owner of the legal title to the stock of Uebersee, had an interest therein, it remanded the case for consideration of the rights of Fritz von Opel, not previously a party to the action. According to the Supreme Court's opinion and mandate, this consideration was to be made in the light of its opinion in *Kaufman* v. *Societe Internationale,* 343 U.S. 156, and its opinion in this case. Fritz von Opel was then permitted to intervene to assert his rights and has become the present appellant. The first question to be considered, therefore, is whether appellant has any right to recover in this action as an intervener under the theory of the *Kaufman* decision and the decision of the Supreme Court in this case.

The Supreme Court in *Kaufman, supra,* held that an innocent stockholder in a neutral corporation has a sufficient right, title or interest in the vested assets of his corporation to support a suit against the Custodian under Section 9(a) of the Trading with the Enemy Act. The Supreme Court further held that such a stockholder might intervene in the corporation's action under Section 9(a) and recover a proportionate share of the vested assets, even though the corporation might be enemy tainted and thus not succeed in the action. What then is the meaning of the term "innocent stockholder"? Obviously, such a stockholder must be a person not an enemy or ally of enemy under the Trading with the Enemy Act, for, under the express terms of Section 9(a), the United States has consented to be sued only by those who are not enemies or allies of enemies. It is apparent, therefore, that the Supreme Court in using the term "innocent stockholder" meant something more than a person who is merely not an enemy.[7] A brief analysis of the *Kaufman* decision will show that this is the fact.

Kaufman, the applicant in intervention, alleged that he was the owner of a small number of shares of the stock of Societe Internationale, a Swiss corporation, which was dominated and controlled by officers and stockholders who were engaged in a conspiracy with German nationals and the German government to operate the corporation's business in the interest of Germany during the war. Alleging that the corporation was thus dominated by enemy nationals, Kaufman asserted that the corporation was in no position to protect the interests of innocent stockholders who were not part of the dominant managing group and who were not connected with the hostile aims of such group. The Supreme Court, realizing that substantial enemy ownership and control could justify the seizure of all of the assets of such a corporation, held that consideration must be given to "the plight of innocent stockholders". *Kaufman* v. *Societe Internationale,* 343 U.S. 159. The Court therefore held that

> when the Government seizes assets of a corporation organized under the laws of a neutral country, the rights of innocent stockholders to an interest in the assets proportionate to their stock holdings must be fully protected. (343 U.S. 159-160)

That holding was based upon Kaufman's contentions that as a minority stockholder innocent of any connection with the dominant management and control of the corporation, he should not be penalized by a seizure of all of the assets of the corporation because of the existence of enemy ownership and control. In short, Kaufman contended that his stock should not be made worthless because of the guilt of other stockholders and this view was adopted by the Court.

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[7] The enemy status of any person asserting rights as an innocent stockholder is, of course, relevant and material to the final determination of the stockholder's claim. The status of appellant as an enemy is accordingly discussed in Points II and III, *infra,* pp. 38-69.

In our view, appellant's position is the direct opposite of that of Kaufman. Appellant here asserts that he is the beneficial owner of all of the shares of Uebersee Finanz-Korporation and that he is the legal owner of 97 out of 100 shares, the remaining 3 shares being Director's qualifying shares. Appellant is thus urging upon this Court that as the beneficial owner of all of the stock, he is nevertheless an innocent stockholder of Uebersee, a corporation which has been conclusively determined to be enemy tainted by enemy ownership and control of the same shares. The very statement of appellant's position demonstrates its defects. Appellant, like Kaufman, in order to qualify as an innocent stockholder must allege and prove that he is in truth innocent, that is to say, that he has had no connection with the dominant enemy ownership of the corporation or with the enemy group which controlled and managed the corporation. That statement represents neither more nor less than the holding of the Supreme Court.

The facts of this case make it abundantly clear that appellant, far from being an innocent stockholder, was an integral part of the plan for enemy ownership and control of Uebersee Finanz-Korporation and its assets. The District Court found after the first trial that by virtue of the usufruct agreement of 1931, Wilhelm and Marta von Opel, enemy nationals, had a substantial ownership interest in and controlled the affairs and management of Uebersee (82 F. Supp. 602). This Court affirmed, one judge dissenting, holding:

> This case does not involve a diluted "taint"; it involves the ownership by enemy nationals of the economic benefits of American business. (88 U.S. App. D.C. at 183, 191 F. 2d at 328).

The Supreme Court unanimously affirmed, holding that upon an abundance of evidence in the record, Uebersee

Finanz-Korporation for all practical purposes was 97 per cent owned, managed, used and controlled by Wilhelm von Opel, that Uebersee was a holding company acquired to enable Wilhelm to control and use his property as he saw fit, and that his interest was paramount and controlling (343 U.S. at 206, 211). But appellant urges (Br. pp. 39-40) that he was not part of this enemy ownership and control and that he opposed the reservation of the usufruct by his parents (Br. p. 36). The facts, however, do not support such a contention. The record shows that after October, 1931, under the foreign exchange laws then existing in Germany, Wilhelm von Opel as a resident of Germany was not permitted to hold foreign investments. Under these laws he was required to report all holdings of foreign currency and foreign securities to the German government and to deliver such assets to that government in exchange for payment in German currency. The record also shows that this is precisely what Wilhelm von Opel wanted to avoid. Under those laws, he would not have been able to acquire in his own name a Swiss holding company such as Uebersee Finanz-Korporation which would hold assets abroad to be managed and controlled by him. The method by which he accomplished this was to transfer legal title to these assets to appellant, his son, a non-resident of Germany, early in October, 1931, in such a manner that he reserved to himself an *in rem* interest therein and full powers of control. This was what was achieved by the gift agreement of October 5, 1931. Appellant thus became the conduit through which Wilhelm von Opel, an enemy, was enabled to continue to hold and manage property outside of Germany.

In contrast to appellant's assertion that the usufruct agreement was insisted upon by his father, we cannot overlook the fact that appellant was a party to this agreement[8] and executed it freely and voluntarily, that appellant did not object to the appointment of Hans Frankenberg as managing director of Uebersee as his father's agent, and that appellant established the usufruct some time prior to June, 1935 by delivering the key to the safe deposit box in which the Uebersee shares were located to such agent.

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[8] Appellant also, prior to the execution of the agreement, personally consulted with a German lawyer, Hachenburg, concerning the preparation of such an agreement with a usufruct included therein (Former App. 323, 410, 590). Hachenburg prepared a

Nor was appellant an unwitting participant in this transaction. He personally engaged in activities on behalf of Uebersee and gave instructions concerning its investments (Fdg. 44, App. 67a). He carried on these activities, not as an innocent employee of the corporation, but under the guidance and direction of Wilhelm von Opel or his agent, who was also the managing director of the corporation (Fdgs. 39-41, 45, App. 66a, 67a, 68a). Among such activities were his efforts in the so-called *Gold* case (*Uebersee Finanz-Korporation* v. *Rosen, supra*), in which he took great pains to make it clear by affidavit and otherwise that he had mere naked legal title to the stock of plaintiff Uebersee and that the entire beneficial ownership and control of that stock was vested in his father. Among his activities also were his strenuous efforts to speed up the production of bauxite in Hungary for shipment to Germany and to arrange for such shipment by negotiating contracts with German aluminum manufacturers.

Finally, it was appellant who assumed the guidance and control of Uebersee's original action to recover its vested assets from the Alien Property Custodian. He was the main witness for the plaintiff, his testimony covering over 700 pages of the record. It was he who retained counsel, who directed the course of the action and who authorized an appeal. It was appellant who stoutly maintained that there was no usufruct, or that if there was one it was waived, or that if it was not waived, it was destroyed by the colorable tax avoidance "sale" of the shares to some 15 unknown Swiss purchasers. And it was appellant who

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draft agreement providing for a usufruct (Pl. Ex. 8, Former App. 1813). The present agreement was finally drawn up by another lawyer in an hour or less (Former App. 239, 611).

urged that his parents, Wilhelm and Marta von Opel, had no interest whatsoever in the stock of Uebersee or in its assets and that he, appellant, was the sole legal and beneficial owner thereof.

The Supreme Court was equally aware, upon an examination of the record, of appellant's status as an integral part of the enemy ownership and control of Uebersee. It found that appellant's interest was wholly and in reality subordinated to that of Wilhem and that

> Wilhelm had and used the substance, while Fritz had the bare legal title; and such right as this gave Fritz, he exercised or failed to exercise in complete subordination to the will of his father. (343 U. S. 211).

It can hardly be said then that appellant is in the same position as Kaufman. He was the means whereby enemy ownership and control of these assets was effectuated; he was not innocent of any connection with the enemy ownership interests; he was not innocent of the enemy management and control. On the contrary, he carried on his own activities under such management and control. Even though under the German law applicable to usufructs, he was entitled to a voice in the management and disposition of the usufruct property with the usufructuary, such right as he had he "exercised or failed to exercise in complete subordination to the will of his father." (*Uebersee Finanz-Korporation* v. *McGrath,* 343 U. S. 211). And it was appellant who unsuccessfully attempted to represent to our courts, contrary to the facts, that there was in truth no enemy ownership or control of the corporation.[9]

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[9] Appellant's contention that the plaintiff corporation's claim was first rejected because appellant was not in control and that his present claim is rejected because his interest was subordinate (Br. p. 39) does not withstand analysis. Appellant's present claim is not being rejected because his interest was subordinate and passive, as appellant states, but rather because his interest was *subordinated* to that of his father and because whatever rights he had he exercised or failed to exercise "in complete subordination to the will of his father" (343 U.S. 211).

Appellant, therefore, was the direct antithesis of Kaufman. As a person inextricably a part of the dominant enemy ownership and control he cannot be deemed to be an innocent stockholder, and hence can assert no rights of recovery under the *Kaufman* decision. Appellant urges, however, (Br. pp. 22-24) that, under the *Kaufman* decision, all non-enemy stockholders are entitled to recover, relying on the fact that in the second part of its opinion the Supreme Court used the term "non-enemy stockholders" instead of "innocent stockholders". It is worthy of note, however, that it is the first part of the Supreme Court's opinion that establishes the right of innocent stockholders to recover a proportionate share of the vested assets of a neutral corporation and that in that part of the opinion no reference is made to "non-enemy stockholders". The second part of the opinion is devoted exclusively to the question of whether intervention in a pending suit under Section 9(a) is an appropriate remedy. Moreover, as previously noted, if the Supreme Court meant to include within the benefits of its decision all non-enemy stockholders, most of the opinion becomes pure dictum. If that was what the Supreme Court was determining, it need only have stated its conclusion that stockholders under the Trading with the Enemy Act have an interest in the assets of their corporations. The Court, however, did not do this; it discussed at some length the factual pattern of the case, emphasizing particularly Kaufman's allegations that he was innocent of any connection with the dominant enemy ownership and management. It was in this context that the Supreme Court held that innocent stockholders have a right of recovery under the Trading with the Enemy Act.[10]

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[10] Appellant also makes the surprising argument that the dissenting opinion in *Kaufman* takes the position that all non-enemy stockholders may recover under the Court's decision and that the failure of the majority of the Court to qualify its statements in the face of this dissenting opinion is indicative of the correctness of the dissent. An assertion that the majority of the Court must respond to statements of its dissenting judges lest the latter be interpreted as authoritative requires no comment.

If we take a moment to consider what would be the result if we were to adopt appellant's contentions, the correctness of the view we have advanced becomes obvious. Under appellant's construction he, as a non-resident of Germany and as an asserted non-enemy, would be eligible to recover. He would therefore receive at least a substantial part of the vested assets of Uebersee Finanz-Korporation, notwithstanding the fact that three courts have determined that Uebersee cannot recover the same assets because of its enemy taint. Furthermore, upon receiving such assets he would hold them still subject to the usufruct agreement and could be legally required to re-establish the usufruct therein at any time. This is necessarily true inasmuch as the usufruct has never been waived nor abandoned (Fdg. 51, App. 69a). Although appellant's father died during the period of vesting, his mother is still alive to claim her usufruct. By doing so she could re-establish the situation precisely as it existed prior to vesting, thus achieving a complete return of vested property to enemies. That is hardly the intention of the Trading with the Enemy Act.

Under the facts of *Kaufman* and the facts of this case, therefore, the District Court was amply justified in stating:

> Fritz von Opel is not in a position to assert, like plaintiff interveners in *Kaufman* v. *Societe Internationale, supra,* that he is a mere innocent investor in an ostensibly neutral corporation, with interests hostile to the dominant enemy management, without knowledge the assets in his name were contributing to the resources of enemy nationals. (133 F. Supp. 622, App. 47a)

This is not only the correct interpretation of the *Kaufman* decision, but a necessary one. It is also the correct interpretation of the facts of this case. Far from being an innocent stockholder, appellant was part and parcel of the enemy owned and controlled corporation. Since appellant cannot qualify as an innocent stockholder under the standards of *Kaufman,* he is not entitled to recover on his complaint in intervention herein.

II

Appellant Was Doing Business Within Enemy Territory and Was Thus an Enemy Barred from Recovery Herein

The District Court held that appellant could not recover herein because he was an enemy under the Trading with the Enemy Act by reason of his residence outside the United States and doing business in enemy territory and by reason of his enemy taint. Section 9(a) of the Act extends the Government's consent to suit for the recovery of vested property only to those who are not enemies or allies of enemies under the Act. In this section, we shall discuss appellant's enemy status by virtue of doing business in enemy territory. His status as an enemy by virtue of his enemy taint is considered in Point III, *infra*, pp. 54-69.

A. *Appellant Was Resident Outside the United States*

Section 2(a) of the Trading with the Enemy Act (50 U.S.C. App. Sec. 2(a)) defines an enemy, among other things, as a person resident outside the United States and doing business within the territory of any nation with which the United States is at war (including territory occupied by such nation). The District Court found that appellant was not a resident of the United States (Fdg. 63, App. 73a; 133 F. Supp. 619, App. 41a) and was resident outside the United States (Concl. 10, App. 86a). Indeed, appellant consistently urged his residence outside the United States until the issue of doing business was presented at the second trial.

At the first trial, plaintiff corporation introduced evidence, and the Court found, that the present appellant was a resident of Switzerland (Pl. Ex. 49, Former App. 1848, 1849; Fdg. 6, App. 60a). No contrary evidence was introduced at the present trial. It is appropriate, however, to examine the facts and law applicable to appellant's residence before considering the correctness of the District Court's finding that he was doing business in enemy territory.

Appellant ceased to reside in Germany after December 1929 and thereafter lived in the United States, Belgium and

Switzerland (Fdg. 6, App. 60a). In 1934, he became a Swiss domiciliary (Pl. Ex. 49, Former App. 1848, 1849; Fdg. 6, App. 60a; App. 231a, 232a). In November, 1939, he became a citizen of Liechtenstein upon payment of approximately $10,000, although the only times he had been in that country were when traveling through it (Fdgs. 7, 8, App. 61a).[11] This citizenship was obtained under a waiver of the legally established residence requirements and without an oath of allegiance (Fdgs. 8, 9; App. 61a). Although appellant claimed he was too sick to travel to Liechtenstein to take the oath of allegiance, it appears that on the date of his naturalization he was in Hungary attending to the bauxite affairs of Transdanubia Bauxite, A.G. (Former App. 893, 894, 1641; Def. Ex. 93, Former App. 2286). He had no familiarity with the affairs or institutions of Liechtenstein (Former App. 438, 491, 497, 588), and considered his Liechtenstein passport as something with which he was able to fool the British at Gibraltar on his way to the United States in 1940 (Former App. 1146). His statements and actions displayed a continued interest in the welfare of and sympathy for Germany (Fdgs. 10, 64, App. 61a, 73a; 133 F. Supp. 619, App. 40a).[12] He supported the Nazi regime in Germany except when it conflicted with his investments and personal safety (Fdg. 64, App. 73a, 133 F. Supp. 619, App. 40a, 41a). He was friendly socially with persons prominent in the Nazi Government of Germany (Fdg. 64, App. 73a; 133 F. Supp. 619, App. 41a; App. 476a-479a, 190a; Int. Exs. 6, 7, App. 823a, 828a; App. 222a, 470a-474a).

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[11] It may be noted that the total area of the Principality of Liechtenstein is 65 square miles.

[12] Illustrative statements are "There isn't going to be much of a war. The English won't fight. All we are going to do is take off a little slice of Poland" (August 1939) (Former App. 1142).

"By using rockets and secret weapons, we will finish up this war in no time at all" (Early summer, 1940) (Former App. 1105).

He expressed pleasure in the German progress in France and the low countries and in the fact that "some of his inventions were playing a particular part in it" (Early summer, 1940) (Former App. 1105-1106).

"Hitler was the world's greatest strategist" (App. 477a, 478a).

Although appellant initiated steps to immigrate into the United States in 1934, 1936 and 1937, he never actually did so, and when his wife went to Cuba to reenter the United States under a visa for permanent residence he did not accompany her (Fdg. 61, App. 73a). He entered the United States in May, 1940 under a visitor's visa valid for six months, and this visa was extended for further six-month periods until February, 1942, when he was interned as an enemy alien (Fdgs. 57, 58; App. 72a). He remained in interment until May 1945 and left the United States under permission for voluntary departure (Fdg. 59, App. 72a).

The District Court deemed it appropriate to consider appellant's sympathies, attachments, activities, associations, statements and ties as bearing on residence (133 F. Supp. 618, App. 39a, 40a). See *District of Columbia* v. *Murphy,* 314 U.S. 441; *Kristensen* v. *McGrath,* 86 U.S. App. D.C. 48, 179 F. 2d 796, affirmed 340 U.S. 162; *Stadtmuller* v. *Miller,* 11 F. 2d 732 (C.A. 2); *Ruoff* v. *Brownell,* 14 F.R.D. 371 (D.C.D.C.). It concluded that on the facts appellant was present in the United States during the war merely as a visitor, transient, or sojourner, with no fixed or settled abode in the United States and thus was not a resident of the United States (Fdg. 63, App. 73a; 133 F. Supp. 619, App. 41a). Of equal importance, the Court found that appellant's leaving Switzerland was only temporary, that his ties remained in Switzerland and Germany, and that he had no interest in, or bonds of affection or sentiment to, the United States other than a financial interest (133 F. Supp. 619, App. 41a).

Notwithstanding this overwhelming preponderance of evidence, appellant still urges that the District Court was in error in finding appellant to be resident outside the United States, and that the Court must find residence in a specific locality outside of the United States. Nothing in the statute, legislative history or judicial authorities supports the latter assertion. The District Court found appellant to be "not a resident of the United States" (Fdg. 63, App. 73a) and "resident outside the United States" (Concl. 10, App. 86a) in the precise words of the statute. No more is required. Moreover, even appellant's contention is answered by the Court's finding that appellant's leaving Switzerland was only temporary (133 F. Supp. 619, App. 41a). In the face of the evidence that he was previously domiciled and resident in Switzerland, this is an implicit finding that he remained a resident of that country.

Appellant further urges that since he was not present outside the United States, he could not be resident outside the United States under Section 2 of the Act in view of the Supreme Court's definition of residence in *Guessefeldt* v. *McGrath,* 342 U.S. 308. This is a clear perversion of the Supreme Court's decision in that case. The Court there held that "resident within" enemy territory under Section 2(a) of the Act (50 U.S.C. App. 2(a)) means something more than mere physical presence and something less than domicile. The situation before the Court in *Guessefeldt* involved a longtime resident of the United States who had gone to Germany in 1938, allegedly for a visit, intended to return to the United States, and allegedly was involuntarily detained in Germany during the war. The Supreme Court held that in order for Guessefeldt to *become* resident within enemy territory something more than mere physical presence therein was required.[13] Far from holding that a person could not be a resident of a designated country without physical presence, the Supreme Court held on these allegations that Guessefeldt retained his American domicile and residence (342 U.S. 312). Thus it was held on the allegations of his complaint, that Guessefeldt was domiciled and resident in the United States, notwithstanding the fact that he was physically present in Germany throughout the war. The other cases cited by appellant (Br. p. 52), which the Supreme Court expressly noted without approving any of them, are similar in that they involve persons temporarily present in enemy territory who were held not resident there and still resident in the United States.

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[13] It is significant to note that upon remand of the case for trial, the District Court held that Guessefeldt intended to and did become a resident of Germany. This Court affirmed, 94 U.S. App. D.C. 155, 213 F. 2d 24, and the Supreme Court denied certiorari, 348 U.S. 875.

Appellant carefully avoids making any statement that he was a bona fide resident of the United States, but rests on the proposition that he was a sojourner staying here.[14] Appellant could hardly contend in good conscience that he was a resident of the United States in view of the fact that he never took advantage of his opportunities to immigrate to this country under a visa for permanent residence, that he came here under a visitor's visa valid for only six months and thereafter renewed only for six months at a time,[15] and that during the war he was here under involuntary restraint. His situation thus exactly parallels that of Guessefeldt and the other plaintiffs in the cases cited by appellant who claimed that they went to enemy territory before the war for temporary visits, and when war came, were unable to leave.

Applying the rule of *Guessefeldt* to this case, therefore, it is clear that appellant, a resident of Switzerland, came to the United States for a temporary purpose. He was physically present here, but no more. Hence, he was not resident within the United States, but retained his residence in Switzerland.[16] As a resident of Switzerland, he was resident outside the United States within the meaning of Section 2(a) of the Act (50 U.S.C. App. Sec. 2(a)).

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[14] Appellant's citation of the legislative history of the Act and the statement of Representative Montague (Br. p. 53) to the effect that residence includes sojourners, is flatly contradicted by the Supreme Court in *Guessefeldt, supra,* which quotes the same gentleman on the same page of the Congressional Record as stating that sojourners were not included. Moreover such citation is directly contradicted by the *Guessefeldt* decision itself.

[15] *Commissioner* v. *Patino,* 186 F. 2d 962 (C.A. 4) and *Commissioner* v. *Nubar,* 185 F. 2d 584 (C.A. 4), cited by appellant (Br. p. 54), are clear authority that under the revenue statutes, persons within the United States for limited periods under the immigration laws are not residents of the United States.

[16] Appellant states that no residence outside the United States was proved or found. Compare Chief Judge Laws' analysis of the evidence relating to this question (133 F. Supp. 618, 619, App. 38a-41a).

B. *Appellant Was an Enemy Because Doing Business Within Enemy Territory*

Plaintiff Uebersee owned all of the stock of Transdanubia Bauxite, A.G., a Hungarian corporation, mining bauxite in Hungary (Fdg. 22, App. 63a). The operations of this corporation were started by appellant in 1935 or 1936 (App. 297a). In the subsequent years, he made numerous trips to Hungary for the purpose of supervising the affairs of that corporation (App. 557; Former App. 893, 894; Def. Exs. 76, 93, 95, Former App. 2262, 2286, 2288) and in July and November, 1939 he made trips to Hungary for the specific purpose of expediting bauxite production (Former App. 893, 894; Def. Exs. 76, 77, 93, 95, Former App. 2262, 2263, 2286, 2288). He was very active in connection with the financial affairs and production problems of Transdanubia and its relationship to Giulini Bros., the German purchaser of the bauxite (Def. Exs. 76-82, 92-94, 96, 97, Former App. 2262-2271, 2285-2287, 2294, 2296). Upon receipt of a letter of September 16, 1939 from Giulini stating that appellant "would do meritorious service for the raw-material supply of the German aluminum industry and the entire war economy of Germany" if he would tackle the problem of bauxite production (Def. Ex. 81, Former App. 2270), appellant replied that "upon receipt of order" he was "immediately ready to travel Budapest for purpose of starting production" (Def. Ex. 82, Former App. 2271). Accordingly, he went to Hungary in November, 1939, and while there undertook negotiations with representatives of Giulini which led to the execution of a contract under which Transdanubia undertook to deliver 100,000 tons of bauxite to Giulini during the years 1940, 1941 and 1942 (Fdgs. 31, 72, App. 65a, 75a; Def. Ex. 97, Former App. 2296).

These facts were established at the first trial. Admittedly, these activities of appellant all took place before a state of war came into existence between the United States and Hungary on December 13, 1941 (Fdg. 31, App. 65a). Admittedly also, these activities alone could not serve as a sufficient basis for charging appellant with doing business with Hungary after December 13, 1941. When there is added the evidence adduced at the second trial, however, the situation becomes vastly different.

It is apparent that appellant did not spend his full time in Hungary in connection with the affairs of Transdanubia, and he therefore entrusted its management to local representatives. One of these was a Dr. Salusinszky, a Hungarian lawyer, who acted as appellant's agent (Fdg. 67, App. 74a). In 1936 appellant gave Dr. Salusinszky powers of attorney which authorized the latter to represent appellant and to sign in his name for Transdanubia Bauxite, A.G. (Fdg. 67, App. 74a; Def. Ex. 127, App. 1036a). In the summer of 1939, Dr. Salusinszky was killed in an automobile accident in Hungary, and it therefore became necessary for appellant to appoint a new representative. This he did in August or September, 1939 by giving powers of attorney in the same form as those previously given to Dr. Salusinszky, to a Dr. Timar. These powers of attorney authorized Timar to represent appellant in dealings with individuals and public authorities and to sign in appellant's name for Transdanubia. They were required because documents were needed which required the signature of appellant or his attorney in fact (Fdg. 67, App. 74a; Def. Exs. 127, 129, App. 1036a, 1041a). Appellant actually executed four powers of attorney, the other two authorizing Dr. Timar to act for him in connection with some litigation with former associates named Fayer and Koranyi (*ibid.*). No evidence was submitted that these powers of attorney were revoked at any time (Fdg. 71, App. 75a). Appellant on the witness stand attempted to deny that the powers of attorney were as broad as represented, but never asserted that they were not given or had been revoked. Under these powers of attorney, the affairs of Transdanubia were carried on. Bauxite was shipped to Germany through the months of October, November and December, 1941 (Fdgs. 31, 73, App. 65a, 75a), and the Court properly inferred that such shipments continued thereafter in view of the fact that the contract negotiated by appellant called for shipments through the end of 1942, and that in November, 1942 Transdanubia was able to repay a bank loan which Uebersee had guaranteed (Fdg. 73, App. 75a).

On the basis of these facts, the Court found that although appellant was not present in Hungary after December 13, 1941, his activities on behalf of Transdanubia through appointment of agents to conduct the business of Transdanubia after that date continued nonetheless, and constituted doing business in enemy territory, namely Hungary, under the Act. The Court reached this result upon the ground that the agents' activities were attributable to appellant by reason of his appointment of such agents (Concl. 10, App. 86a; 133 F. Supp. 620, App. 43a).

Since Section 2(a) of the Act (50 U.S.C. App. § 2(a)) defines an enemy as, among other things, a person resident outside the United States and doing business within enemy territory, and Section 9(a) limits recovery to persons who are not enemies, appellant, by doing business in enemy territory, has become an enemy and is barred from recovery herein (*Swiss Insurance Co.* v. *Miller,* 267 U.S. 42).

Although Transdanubia Bauxite, A.G. was in fact owned by plaintiff Uebersee, and appellant's activities in connection with Transdanubia were carried on on behalf of Uebersee, this fact does not prevent appellant personally from being chargeable with doing business in enemy territory. An employee or agent of a corporation who performs the corporation's business in enemy territory is himself engaged in doing business within such territory (*Commissioner of Internal Revenue* v. *Stokes,* 200 F. 2d 637 (C.A. 3)). Consequently, the fact that appellant may have been acting on behalf of Uebersee is of no moment. By appointing an agent to carry on business and to sign for appellant in his name, appellant was doing business in enemy territory through his alter ego, his agent Timar. Doing business through an agent is certainly as effective for the purposes of the Act as doing business in person. Having been appointed by appellant to sign in his name, Timar was appellant's agent even though his actions would inure to the benefit of Uebersee Finanz-Korporation.

The unqualified words "doing business within" set forth in Section 2(a) as a criterion of enemy status are words of broad scope and application. As stated by the Supreme

Court in a case arising under the revenue statutes, " 'business' is a very comprehensive term and embraces everything about which a person can be employed", and it may be defined as "that which occupies the time, attention and labor of men for the purpose of a livelihood or profit." *Flint* v. *Stone Tracy Co.,* 220 U.S. 108, 171. See also, *Von Baumbach* v. *Sargent Land Co.,* 242 U.S. 503, 517; *Section Seven Corp.* v. *Anglim,* 136 F.2d 155, 158 (C.A. 9); *Lyon Lumber Co.* v. *Harrison,* 113 F.2d 443, 446 (C.A. 7); *American Investment Securities Co.* v. *United States,* 112 F.2d 231 234 (C.A. 1); *Page* v. *M. Rich & Bros. Co.,* 99 F.2d 607, 610 (C.A. 5). The Restatement of Conflict of Laws (Section 167(a)) states:

> Doing business is doing a series of similar acts for the purpose of thereby realizing pecuniary benefit, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts.

There can be no doubt, as the District Court held, that contributing to the resources of the enemy by supervising and encouraging the production of essential war materials in an enemy country for shipment to another enemy country is doing business within enemy territory (133 F. Supp. 620, App. 43a). Equally so, it is doing business in enemy territory to perform such actions through an agent appointed before the war for the very purpose of conducting such business during the war.

Appellant first urges (Br. p. 55) that the evidence was insufficient to enable the Court to reach this conclusion because there was no evidence as to the exact terms of the powers of attorney referred to. Appellant overlooks the fact that the documents referring to these powers of attorney (Def. Exs. 127, 129, App. 1036a, 1041a), which are letters from Timar, were produced from appellant's files pursuant to an order of the District Court requiring, among other things, the production of all documents in appellant's possession relating to Transdanubia. Appellant, significantly, did not produce, nor offer in evidence, any copies of his replies to the letters in question, nor any copies of the powers of attorney themselves. If these powers of attorney in truth were not as broad as stated by Dr. Timar, it was exclusively within appellant's power to reveal the true extent of such powers. This he did not choose to do. When asked about these documents he first stated, "I wouldn't remember things in this direction" (App. 305a), and then contented himself with general statements that he executed no sweeping powers of attorney.

Unfortunately for appellant, however, Dr. Timar's letter referring to the powers of attorney is quite specific. He states that appellant in 1936 had given Dr. Salusinszky powers of attorney in order that "he could represent you in dealings with individuals as well as public authorities and sign in your name for the firm of Transdanubia Bauxit." In view of the death of Salusinszky, it became necessary to transfer that authority to Timar, who therefore enclosed

> the texts prepared at that time by the late Dr. Salusinszky with the request to sign them and return them to me. Early attention to my request would be greatly appreciated since it might become necessary in a short time to make dispositions in your name, that is, to sign your name, which, of course, cannot be done without a proper power of attorney. (Def. Ex. 127, App. 1036a, 1037a).

This evidence is clear and specific and, contrary to appellant's assertion (Br. p. 56), does show the extent of the powers granted. It will be noted that Timar does not refer to any specific transactions, but merely makes general reference to dispositions in the name of appellant in the future.

Appellant also protests (Br. p. 56) that there was no evidence as to the termination date of these powers of attorney. The Court found, however (Fdg. 71, App. 75a) that there was no evidence that the powers of attorney were ever revoked. Appellant points to no evidence contradicting this finding of the Court. The simple fact is that appellant was on the witness stand and had ample opportunity to state that these powers were revoked or expired by their terms. He offered no evidence to that effect and the Court was, therefore, fully justified in concluding that these powers, as in the case of the ones previously delivered to Salusinszky, were continuing ones which were never revoked. Appellant further protests (Br. p. 56) that Salusinszky and Timar were merely legal counsel for Transdanubia and took care of legal work. Appellant testified, however, that Timar was one of the "managers" of Transdanubia (App. 302a, 303a.; Former App. 882). The attempt to characterize Timar as merely legal counsel, therefore, is contradicted by appellant's testimony. There was thus abundant evidence as to the scope and extent of the powers of attorney and they were not "undefined" as contended by appellant (Br. p. 55). It is also clear that Timar acted under these powers of attorney, since they were necessary to continue the business and such business was still being carried on in 1941 and 1942.

Appellant also appears to urge (Br. p. 58) that intervenor cannot be held to be doing business in enemy territory unless Uebersee, the owner of Transdanubia, was doing business in such territory. Clearly, however, Uebersee was itself doing business within enemy territory under the evidence submitted at this trial, in view of appellant's activities on its behalf and in view of the appointment of agents to act on its behalf. Since Uebersee was no longer an active party to this litigation, however, in view of the affirmance of the judgment against it, the District Court was not called upon to make findings as to the activities of Uebersee. Instead, at appellant's request, the Court found that there was no evidence that Uebersee was doing business in Hungary after December 13, 1941 "except as herein otherwise found" (Fdg. 74, App. 76a). In any event, the Court further found that appellant's relationship to Transdanubia was more direct than that of Uebersee and of his father in whose interest he was acting (Fdg. 74a, App. 76a). Such finding is clearly supported by the evidence summarized.[17]

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[17] There is no inconsistency as claimed by appellant (Br. p. 55) between the Court's previous findings that Uebersee was controlled by Wilhelm von Opel and the present findings. As the Court previ-

Appellant cites numerous cases (Br. p. 59) purporting to hold that a parent corporation does not do business by virtue of the activities of a subsidiary corporation merely on the ground of the stock ownership of the subsidiary. These authorities, however, clearly have no relationship to the problem herein. We are no longer dealing with the problem of Uebersee's doing business through Transdanubia merely by stock ownership. We are concerned only with the personal activities of appellant in supervising and encouraging the production of bauxite in Hungary and contributing to the resources of the enemy by arranging for the shipment of such bauxite to Germany.[18]

Appellant urges finally (Br. pp. 61 ff.) that in any event the powers of attorney granted by appellant were terminated by the outbreak of war between the United States and Hungary. The first answer to this contention is that this identical argument was made by plaintiff Uebersee before this Court (App. Br. p. 64) and before the Supreme Court (Pet. Br. p. 7) on the prior appeal with respect to the continued agency of Frankenberg on behalf of Wilhelm von Opel. The same situation was there presented, namely, Frankenberg after 1940 was in the United States and his principal, Wilhelm von Opel, was in Germany. Notwithstanding these arguments advanced by Uebersee, the Supreme Court, in its unanimous opinion, held that Wilhelm von Opel through his agent Hans Frankenberg, the managing director of Uebersee, controlled Uebersee until the date of vesting in 1942 (343 U.S. 209-211). Thus,

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ously held (Fdgs. 44, 45, App. 67a, 68a), the activities of appellant were carried on under the guidance and direction of his father and his father's agent and the Court adhered to this finding (Fdg. 74, App. 76a).

[18] Appellant's argument (Br. p. 60) that this decision sets an unfortunate precedent which would justify the seizure of property of American corporations in any future war is not in point for the same reasons. Moreover, such argument is answered in appellant's brief (fn. 20, p. 60) showing that under Section 2(a) of the Act, American corporations are expressly excluded from the class of corporations which may be chargeable with doing business in enemy territory.

the Supreme Court expressly refused to recognize that an agency is necessarily terminated by a state of war. The second answer is that agencies created before the war and not requiring intercourse across the enemy's frontier, such as remittance of funds, are not terminated by war (*Sutherland* v. *Mayer,* 271 U.S. 272; *Williams* v. *Paine,* 169 U.S. 55).[19]

In view of the evidence of appellant's appointment of an agent to represent him and to sign in his name on behalf of Transdanubia Bauxite in Hungary, the evidence that under such powers of attorney the agent supervised and managed the affairs of Transdanubia Bauxite, the evidence that such powers of attorney were never revoked and that in fact Transdanubia continued to ship bauxite to Germany during the war, it is clear that appellant through his agent was doing business within enemy territory and contributing to the resources of the enemy. By virtue of such doing business appellant is an enemy under Section 2(a) and is barred from recovery in this action pursuant to Section 9(a) of the Act (50 U.S.C. App. §§ 2(a), 9(a)).

C. *The District Court Properly Considered the Issue of Doing Business*

Appellant contends that he was surprised by the government's contention that appellant was doing business within enemy territory, that it was not within the issues formulated at pretrial and that the Court below should not have considered it. The District Court, however, overruled all of these contentions and properly held that this issue was within its own pretrial order, and that appellant knew or should have known that this issue would be raised (Concl. 9, App. 86a; 133 F. Supp. 625, App. 54a).

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[19] Other cases in which agencies, in addition to those for the collection of debts, have been held to survive the outbreak of war are: *Fujino* v. *Clark,* 71 F. Supp. 1 (D. Hawaii), affirmed, 172 F. 2d 384 (C. A. 9), certiorari denied, 337 U.S. 937; *Second Russian Insurance Co.* v. *Miller,* 297 Fed. 404 (C. A. 2), affirmed, 268 U.S. 552; *Hubbard* v. *Matthews,* 54 N. Y. 43; *Pipe* v. *The La Salle,* 49 F. Supp. 662 (S. D. N. Y.); *Daimler Co.* v. *Continental Tyre & Rubber Company,* [1916] 2 A.C. 307, 326, 349.

A pretrial hearing in this matter was scheduled by Chief Judge Laws for November 16, 1953. At that time, both parties submitted statements of their respective contentions. Appellant's memorandum states, "he [appellant] did not at any relevant time reside within the territory, or the occupied territory, of any nation which was an ally of a nation at war with the United States, or do business within such territory" (App. 12a). The Government's pretrial memorandum states the second question presented as "whether Fritz von Opel is innocent of enemy status or enemy taint and, therefore, eligible to recover property herein under Section 9(a)" (App. 18a).

Upon the pretrial hearing Chief Judge Laws quickly saw that the first problem to be determined was the applicability of *res judicata* in this proceeding. He, therefore, suggested that the government file an appropriate motion raising this question for his determination and adjourned the pretrial hearing without date. No further pretrial hearing was held and the District Court's opinion and order on the issue of *res judicata* became the pretrial order herein. Both the opinion and order provided that either party

> may offer additional evidence to supplement the findings of fact and conclusions of law previously made in this action on the issues of (1) said intervener's enemy status, (2) said intervener's enemy taint and (3) the value of said intervener's severable interest and that no other evidence may be introduced (121 F. Supp. 426, App. 31a, 32a).

The order thus entered was the order which governed the conduct of the trial. The term "enemy status" as used therein clearly refers to the definition of enemy under Section 2(a) of the Act, including enemy status by virtue of doing business. Thus, this issue was clearly within the pretrial order and evidence thereon was expressly allowed to be introduced under an order entered more than six months before the commencement of the trial.

Thereafter, the Government served interrogatories upon appellant seeking to ascertain the nature of documents in appellant's possession concerning many facets of this case, and specifically including his relationship to Transdanubia. Appellant answered these interrogatories, and thereafter, without objection by appellant, an order was entered requiring him to produce for inspection the documents referred to in such answers. Such production was made in December, 1954 and the documents relating to the powers of attorney delivered to Dr. Timar were among those so produced. Thus, appellant was well aware or should have been aware that his activities in connection with Transdanubia would be fully explored.

Upon the trial of this action, upon direct examination of appellant, his counsel asked him numerous questions concerning the affairs of Transdanubia (App. 206a-211a). Having himself opened the subject again, appellant must have been aware that his relationship with Transdanubia would be fully explored.

Since it appears that the issue of appellant's doing business in Hungary through Transdanubia was expressly included in the issues formulated at pretrial, the District Court committed no error in considering this issue and making findings thereon. Nor can appellant claim surprise, since he was aware of the provisions of the pretrial order, and was put on notice of the existence of an issue concerning his relationship with Transdanubia by defendant's interrogatories and request for production of documents, and by his own testimony on direct examination at the trial.

Appellant, however, contends that he was aware of the fact that his relationship with Transdanubia would be explored only with respect to the issue of enemy taint and hence did not object to the introduction of this evidence on this issue (Br. p. 50). He claims, however, that he was not aware that the issue of doing business in enemy territory through Transdanubia would be involved (*ibid.*). This contention hardly seems realistic. Appellant was fully familiar with the issues formulated in the pretrial order and was thus cognizant of the fact that one of those issues would be appellant's enemy status, as distinguished from his enemy taint. His counsel upon this trial were the same counsel who handled the prior appeals of Uebersee and they are presumably not unfamiliar with the provisions of the Trading with the Enemy Act. Appellant and his counsel, therefore, knew or should have known that the Court in the pretrial order under the issue of enemy status was referring to the statutory definition of enemy as contained in Section 2(a) of the Act, in counter-distinction to the issue of enemy taint, a judicially declared definition of enemy.

Moreover, appellant, by his present claim of surprise, is in reality attempting to create a distinction without a difference. He concedes (Br. p. 50) that the evidence as to the powers of attorney and similar matters involving Transdanubia was properly admissible on the issue of enemy taint and was not objected to. The evidence was thus the same on both issues and the only difference would be the application of the statutory definitions to such evidence. If the evidence was admissible on the issue of taint, then appellant was under the same burden to produce any additional facts he might have, including evidence of Swiss or Hungarian law, if applicable.[20] Appellant's failure to do so cannot thus be ascribed to the introduction of any new issue.

Moreover, since all that was involved was the application of the concept of doing business under the Trading with the Enemy Act to the evidence, appellant had ample opportunity to meet this issue. Appellant was on the witness stand at the time this evidence was introduced on February 25, 1955 and continued testifying on the two days following. On March 2, 1955 the trial was recessed to await the arrival of the witness von Bibra, and to allow counsel to prepare proposed findings at the request of the Court. The trial was not resumed until March 31, 1955, and closing argument did not begin until April 1, 1955. Thus, appellant had a full month to consider and prepare his arguments as to whether or not the evidence thus presented constituted doing business within enemy territory as well as enemy taint.

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[20] In view of appellant's contention (Br. p. 63) that the powers of attorney were really executed on behalf of Uebersee, a Swiss corporation, it is difficult to understand why resort to Swiss or Hungarian law as to the effect of war upon a power of attorney executed by a neutral Swiss corporation in favor of a Hungarian national would be relevant. Considering the power of attorney as having been executed by appellant, however, it is highly doubtful, to say the least, that Swiss or Hungarian law would be applied by this Court to determine the continued effectiveness of such power with respect to the issue of doing business under our own Trading with the Enemy Act. This becomes even more doubtful when it is considered that after 1940 and at the outbreak of war appellant was in the United States.

The only factual difference between the issue of doing business as contrasted with the taint issue was the question of appellant's residence outside the United States. This issue, however, had been fully explored at great length upon the first trial. Moreover, when the evidence relating to doing business was introduced on cross-examination of appellant on February 25, 1955 and objected to by his counsel (App. 275a, 308a) appellant had ample time to supply any additional evidence on his residence. As stated previously, he testified for two full court days and was in fact recalled to the witness stand for additional questions by his counsel after he had concluded his testimony (App. 481a). Thus, whether appellant was genuinely surprised or not, he was hardly prejudiced, inasmuch as he had ample opportunity to meet the issue presented.

In view of the fact that the issue of appellant's enemy status was expressly formulated as one of the issues to be tried, and that appellant had substantial notice of the existence of this issue, the District Court committed no error in determining that appellant was doing business within enemy territory and was therefore an enemy barred from recovery herein.

III

Appellant Is Enemy Tainted and Therefore an Enemy Barred from Recovery Herein

Chief Judge Laws concluded that appellant acted for and on behalf of and as an agent of enemy nationals and that such activities constituted enemy taint of appellant, thus constituting him an enemy barred from recovery herein under Section 9(a) of the Act (133 F. Supp. 625, App. 54a; Concl. 11, App. 86a). This finding and conclusion were based upon a variety of facts, which may be listed briefly as follows: (1) appellant held his interest in plaintiff Uebersee on behalf of and for the benefit of his parents, enemy nationals; (2) appellant's activities not only with reference to Uebersee, but with respect to numerous other business activities of his father were on behalf of, or as agent of, enemy nationals; (3) appellant's activities after the outbreak of war in Europe involving his acquisition of Liechtenstein citizenship to preserve the vested assets for the German government and to prevent the seizure of such assets by the United States were on behalf of the enemy; (4) appellant's offer of aid to the German government, not only by means of his own services but by suggesting a Swiss banker who might be used to aid the German war effort was again on behalf of the enemy; (5) appellant's activities in speeding up bauxite production for shipment to Germany for vital aluminum manufacture were conducted for Germany and the German war effort; and (6) appellant's willingness to act as an agent of the German government in connection with the repurchase of the stock of Adam Opel, A.G. once more demonstrated his activities as agent of the enemy.

Appellant basically attacks this finding of enemy taint in two ways: he states that the concept of enemy taint is not applicable to individuals at all, and that, if it is, the facts do not support a conclusion of such taint. His arguments will, therefore, be considered in that order.

Prior to the outbreak of World War II, the Trading with the Enemy Act had a strictly territorial concept of "enemy" as applied to corporations. Under Section 2, a corporation was an enemy if incorporated in enemy or enemy-occupied territory or doing business within such territory. A corporation incorporated in neutral territory was not an enemy, even though wholly owned and controlled by enemies. *Behn, Meyer & Co.* v. *Miller*, 266 U. S. 457; *cf. Hamburg*

American Co. v. *United States,* 277 U. S. 138. By the First War Powers Act, 1941, however, Congress amended Section 5(b) of the Act to authorize the vesting of property of any foreign country or national thereof.[21] This amendment reflected the awareness of Congress that the Axis countries by various means had acquired indirect ownership and control of nominally neutral property. Such ownership and control was exercised by neutral nominees, agents and holding companies and through contractual relationships or unwritten gentlemen's agreements.[22]

When this action was first instituted, the problem arose of the apparent conflict between Section 5(b), authorizing the vesting of property of any foreign national, and Section 9(a) permitting recovery of vested property by any non-enemy. It was this asserted conflict which the Supreme Court was asked to resolve on the first appeal in this case. The opinion of the Supreme Court on that appeal (332 U. S. 480) is most instructive. Athough dealing with a corporate plaintiff, Uebersee, it surveyed the entire problem of the proper construction of Section 9(a), in view of the amendment to Section 5(b). It concluded that Congress had amended the Act to reach enemy interests which could not previously be reached under the original definitions of enemy in Section 2, stating:

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[21] By executive definition, the term "national" included "any person to the extent that such person is, or has been . . . acting or purporting to act directly or indirectly for the benefit of or on behalf of any national of such foreign country." Executive Order 8389 (April 10, 1940), 5 F.R. 1400, as amended by Executive Order 8785 (June 14, 1941), 6 F.R. 2897, Sec. 5 E (iii); made applicable to the exercise of the vesting power by Executive Orders 9095 (March 11, 1942), 7 F.R. 1971, and 9193 (July 6, 1942), 7 F.R. 5205, Sec. 10. These definitions were ratified by Congress, Joint Resolution of May 7, 1940, 54 Stat. 179; First War Powers Act, 1941, Sec. 302, 55 Stat. 840.

[22] See H. Rept. 1547, 77th Cong., 1st sess., p. 3; United States Treasury Department, *Administration of the Wartime Financial and Property Controls of the United States Government* (1942), pp. 29-31; Hearings before a Subcommittee of the Senate Committee on Military Affairs (Kilgore Committee) 79th Cong., 1st Sess., pursuant to S. Res. 107 and S. Res. 146, June-December, 1945, pp. 49, 52, 68-9, 564-85, 969-77, 1063, 1203-1221; H. Rept. No. 2398, 79th Cong., 2d Sess., p. 3.

> The property of all foreign interests was placed within reach of the vesting power, not to appropriate friendly or neutral assets but to reach enemy interests which masqueraded under those innocent fronts. (332 U. S. at p. 485.)

The Court further concluded that the manner in which to effectuate this purpose, as expressed in the amended Section 5(b), was to broaden the definition of enemy; it stated that Sections 2, 5(b) and 9(a) of the Act may be read more harmoniously "if the concept of enemy is given the scope which helps the amendment of 1941 fulfill its mission" (332 U. S. 489), and that the definitions of enemy in Section 2 must therefore be regarded as "merely illustrative, not exclusionary." (332 U. S. 488-489). This amendment, in the Court's view, had extended the vesting power "so that no innocent appearing device could become a Trojan horse" (332 U. S. 488) and "to deal effectively with property interests which had either an open or concealed enemy taint" (332 U. S. 485-486).

While the Supreme Court there held that ownership or control of neutral corporations would constitute enemy taint in the corporate action before it, and reserved the question as to what fractional enemy ownership would be sufficient, its decision is not limited merely to corporate claims. Its holding that the definitions of enemy in Section 2 are "merely illustrative, not exclusionary" is not limited to corporations and necessarily means that all persons or corporations affected with an enemy taint are within the scope of the term "enemy". [23]

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[23] Appellant concedes that the concept of enemy taint is applicable to corporations, but argues that it cannot be applied to individuals since Section 2(a) of the Act does not refer to enemy taint (Br. p. 26). But Section 2 is equally silent as to enemy taint of corporations and only defines corporate enemies as those incorporated in or doing business in enemy territory. Appellant fails to recognize that, in the Supreme Court's view, the definitions of enemy have necessarily been expanded by virtue of the 1941 amendment of the Act.

Chief Judge Laws so interpreted the Supreme Court's decision in his opinion rendered after the first trial of this case upon remand. He there stated, 82 F. Supp. at p. 606:

> But where, as in this case, the vested property is found to be owned by individual parties, some of whom clearly are enemies and the sole remaining one of whom is a neutral, it seems proper in a determination of enemy taint of the property, to inquire into possible enemy tendencies of the neutral.

He then examined the circumstances surrounding appellant's acquisition of Liechtenstein citizenship, as then proved, which he characterized as a "technical form" (82 F. Supp. 606), appellant's statements and actions indicating his continued interest in and sympathy for Germany and his readiness to do "meritorious service for . . . the entire war economy of Germany" by expediting bauxite production (82 F. Supp. 606; Def. Exs. 81, 82, Former App. 2270, 2271; see also 133 F. Supp. 619, App. 42a). Chief Judge Laws concluded that "the neutral aspect of ownership in the property is insignificant . . ." (82 F. Supp. 606).

Plaintiff Uebersee attacked this portion of Chief Judge Laws' opinion, in its brief to the Supreme Court, as a "make weight consideration" which was improper. But the Supreme Court in its unanimous affirmance quoted this last statement of Chief Judge Laws, which refers to the enemy taint of appellant, with specific approval. In so doing, the Supreme Court could not have been unaware of the fact that it was made in connection with the District Court's appraisal of the "enemy tendencies" of appellant, the alleged neutral.

Further, on the same day, in its decision in *Kaufman* v. *Societe Internationale, supra,* the Supreme Court, at the outset, restated its earlier decision in the first Uebersee appeal. It said, at 343 U. S. 159:

> We there held that the 1941 amendment authorized the Custodian to seize and vest in himself all property of

> any foreign country or national, even that of friendly or neutral nations. At the same time we refused to hold that the 1941 amendment deprived friendly or neutral nations *or nationals* of a right to have their assets returned *if they could prove that they were free of any open or concealed enemy taint.* [Italics supplied].

Thus the Court expressly recognized that the new concept of enemy taint was properly applicable to individuals, or "nationals", as it chose to term them.

In the light of this judicial history, Chief Judge Laws was, therefore, amply justified in concluding, in his opinion after the trial of appellant's present claim, that appellant's attempted limitation of enemy taint to corporations was unduly restrictive and unwarranted (133 F. Supp. 621, App. 45a). He most appropriately held that the amendment of 1941 was intended to make available new and flexible powers to cope with new methods of economic warfare and that the Act must be construed to effectuate that purpose. His conclusion was that to construe the Act as to preclude inquiry whether individuals outside the definitions of Section 2 are extending aid to the enemy, acting in their behalf, or contributing to their resources would frustrate the intent of Congress (133 F. Supp. 621, App. 45a).[24]

The evidence upon which Chief Judge Laws relied to reach the conclusion that appellant was within this description may be noted briefly. Perhaps first and foremost, attention should be directed to appellant's relationship and correspondence with von Bibra concerning neutral citizenship. First, he had his attorney in Berlin negotiate with German officials in Berlin to determine whether he could relinquish his German citizenship for the duration of the war emergency and assume a neutral citizenship in order to perserve the assets in the United States from seizure in the event the United States entered the war (Int. Ex. 6, App. 823a). Informed that he should discuss this matter with appropriate German diplomatic officials, he approached von Bibra, Counselor of the German Legation in Switzerland and leader of the German Nazi Party in that country, with the same proposal. Appellant specifically informed von Bibra, after the outbreak of war in Europe, that he made this proposal specifically to prevent the seizure of his American assets by the United States and to preserve them for the German Reich. He reported the opinion of his attorneys that the cloaking[25] measures previously adopted would not suffice for this purpose vis-a-vis the very thoroughly informed American authorities (Int. Exs. 6, 7; App. 823a, 828a), and finally, he offered his services to the German government for any activities after the outbreak of war in Europe *(ibid.)*. He received the permission requested from von Bibra, and almost immediately thereafter became a citizen of Liechtenstein upon payment of $10,000 and without ever having been in that country except while traveling through it.[26]

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[24] Appellant argues that the provisions of Section 3 of the Act, making it unlawful for a person within the United States to trade with an enemy, show that Congress did not intend that the property of persons in the United States should be vested (Br. p. 27). This argument was properly rejected by the District Court on the ground that the powers of the Government to vest property are different from its criminal powers and that the latter may not affect the former (133 F. Supp. 620, App. 43a). It is apparent that the United States may only punish criminally persons within its territory and subject to its jurisdiction; its powers as to vesting are quite another matter. The territorial limitations of its criminal jurisdiction have no bearing upon the power to vest property within the United States to prevent its use by the enemy.

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[25] On the witness stand, appellant objected to the use of the term "cloaking" in the English translation of his letter and suggested that the German word might more properly be translated as "smokescreen" or "some kind of hiding" (App. 250a).

[26] That the District Court was correct in concluding that such citizenship was a mere "technical form" (82 F. Supp. 606) is evidenced by the decision of the International Court of Justice in *The Nottebohm Case* (second phase), (*Liechtenstein* v. *Guatemala*), I.C.J. Reports 1955, page 4. That case involved a German citizen resident in Guatemala, Mr. Nottebohm, who became a citizen of Liechtenstein in October 1939 upon payment of the equivalent of approximately $9500 and under a waiver of the residence requirements. During or after the war Guatemala seized Nottebohm's property in

Directly associated with this episode was the revelation that soon after von Bibra received a secret German Foreign Office telegram on September 1, 1939, the date of the invasion of Poland, requesting the names of Swiss citizens to help make foreign exchange available to Germany in the event of war, appellant supplied the name of a Swiss banker to von Bibra for this purpose (Def. Exs. 155, 156, App. 1122a, 1123a). These are clear illustrations of extending aid to the enemy and acting for, on behalf of, or as agent of the enemy. If they may not be relied upon by our courts to deny to an individual the right to recover vested property, then clearly the 1941 amendments to the Act, upon which the Supreme Court relied so heavily, have accomplished nothing. These actions of appellant show that he was attempting to cloak and conceal this property which was owned and dominated by his enemy parents. Thus, he attempted to place this property in such a position as to enable it to be "masquerading under innocent fronts" (332 U. S. 485). To permit recovery herein would be to reward those efforts and to make them successful.

With respect to the very property here involved, appellant also acted on behalf of or as agent of enemy nationals. He held legal title to 97% of the shares of plaintiff Ueber-

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that country and Liechtenstein then instituted this action complaining of the seizure of property of its citizen. The Court held that citizenship conferred by Liechtenstein in these circumstances is not entitled to recognition by other states, saying:

> Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations—other than fiscal obligations—and exercising the rights pertaining to the status thus acquired.
>
> Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-a-vis Guatemala and its claim must, for this reason, be held to be inadmissible. (P. 26).

see, although such shares and the assets of Uebersee remained subject to Wilhelm von Opel's management, use, control and direction (343 U. S. 211). Appellant, as a non-resident of Germany, was thus an essential participant in a transaction devised for the purpose of acquiring a holding company, Uebersee, in order to enable Wilhelm to control and use the property as he saw fit. Without appellant, or some other person similarly situated, Wilhelm von Opel could not have achieved this result under existing German foreign exchange laws requiring the surrender of foreign assets. (Former App. 1276) Appellant was thus protecting the interests of enemy nationals, until vesting intervened, and enabling them to acquire resources for use against the United States. Not only appellant, therefore, but his interests in the property herein involved, were enemy tainted.[27]

He was also acting for the benefit of, on behalf of or as agent of enemy nationals in his activities on behalf of Uebersee. Such activities were under the guidance of his father, an enemy national, or the latter's agent. Moreover, he knowingly and intentionally subordinated his own interests in plaintiff Uebersee and its assets to those of his father and exercised his rights only in complete subordination to and in accordance with the will of his father (343 U.S. 211).[28]

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[27] Appellant asserts (Br. pp. 37, 39) that he should not be censured because of the usufruct existing in favor of his parents herein because it was never concealed but was revealed in the so-called *Gold* case in 1935 (*Uebersee Finanz Korp.* v. *Rosen, supra*). He states, however, (Br. p. 37, fn. 10) that at the prior trial plaintiff Uebersee's contentions that the usufruct was never legally established, that it was lost, and that it was waived, were not accepted. These contentions were advanced through the testimony of none other than appellant, as Uebersee's chief witness. This is hardly complete revelation of the true facts. Moreover, notwithstanding this alleged revelation, appellant now seeks a second opportunity to prove that the usufruct was not established or, if established, was lost (Br. pp. 82-83), contrary to the facts as determined.

[28] Appellant persistently refers to his subordinate and passive interest (Br. pp. 36, 39). This is a gross misdescription; his interest was not subordinate, but intentionally subordinated to that of

Appellant consistently acted as agent and representative of his father. He was his father's representative on the Board of Directors of Collet & Engelhard Machine Tool Factory, Inc., and personally and actively supervised as representative of his father, the majority stockholder, its operations, management and activities, almost to minute detail. Collet & Engelhard's subsidiary, Machine Factory Wiesbaden, Inc., was also personally supervised by appellant in the same fashion, though he was neither an officer nor director of that company. By his own admission, the other officials did what he wanted since they knew he represented the controlling stockholder, his father. In both companies, therefore, it was appellant who determined how they should operate, who should be employed, what salary their officials should receive, and supervised the financial and production activities of the companies.

With his sister, appellant was a member of the Wilhelm von Opel Property Administration Company, a company established to hold his father's assets. He thus lent himself to another enterprise on behalf of his father, although the latter was the manager for life and neither appellant nor his sister were entitled to claim any profits of this company. For its subsidiary, the Wilhelm von Opel Forest Administration Company, appellant, as agent of his father, supervised and managed the forest estate held by the latter company and conducted litigation for it. Appellant also acted as representative of his father in the matter of the bankruptcy of the Union Bank of Berlin.[29]

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his father in accordance with the latter's wishes. Appellant then compounds the error by asserting (Br. p. 36) that recovery is first denied because the enemy usufructuary interest is paramount and appellant's interest subordinate, and that recovery is now denied because such subordinate interest is associated with the dominant interest. As noted in Point I, *supra*, p. 35, recovery is now denied not because of a subordinate and passive interest of appellant, but because he not only placed such interest at the disposal of an enemy national, but exercised or failed to exercise it for the benefit of such enemy national.

[29] Appellant contends (Br. p. 41) that these activities which continued in 1939, and thus some time before the United States entered the war, cannot form the basis of a conclusion of enemy taint. Ap-

With respect to his father's investments, appellant not only consulted with his father, but was influential in formulating the latter's investment policy. Of particular moment for this case, in that regard, is the letter which appellant wrote to his father in 1936 urging the latter to purchase 7,500,000 reichsmarks worth of German shipping shares. Appellant there urged that his father proceed with the transaction in order to prove to the German government that he and his father were "willing to act in the interest of the Reich at any time." (Def. Ex. 123, App. 1011a, 1015a; Fdg. 86, App. 79a).

In considering enemy taint, of course, attention must also be given to appellant's vigorous activities in expediting bauxite production in Hungary for shipment to Germany, including the appointment of agents to carry on such business and to sign his name when required even though he might be absent from Hungary. Appellant was thus able to keep bauxite production moving while traveling to the United States to look after other investments of Uebersee. Although such activities form the basis for a finding of enemy status by reason of doing business, they must also be considered on the independent issue of enemy taint.

Lastly, we cannot overlook appellant's communications with the German Consulate in New York in 1941. Appellant's father apparently thought there was a possibility of repurchasing the Adam Opel stock which he had sold to General Motors in 1929 and, therefore, wished his son to make appropriate inquiries along that line. Although mail and other communications were still open in February 1941 between the United States and Germany, both appel-

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pellant fails to recognize, however, that these activities were not offered by appellee nor accepted by the District Court as establishing enemy taint in and of themselves. They were offered to demonstrate a pattern and consistent course of conduct by appellant in acting as agent and representative of his father, an enemy. They served to demonstrate, as Judge Laws found, that there was no evidence that this close working relationship was ever altered or severed, or that the positions of appellant and his father ever became adverse (133 F. Supp. 623, App. 49a).

lant's father and the German officials concerned apparently thought this matter sufficiently important as to warrant sending a coded message through diplomatic channels to the German Consulate in New York (Def. Exs. 148, 150, App. 1105a, 1110a). Upon being informed of the contents of the coded message, appellant wrote the Consulate that, in order to represent his father in such a matter, he would have to register here as an agent of a foreign government. He was so advised by his attorneys in view of the fact that such a transaction could not be concluded for his father without the approval and cooperation of the German government (Def. Ex. 149, App. 1107a).

Notwithstanding his belief that such registration was required and notwithstanding his belief that he had been subjected to "unreasonable suspicions" and had been followed by F.B.I. agents, appellant, nevertheless, suggested that the Consulate inform his father that he was ready to conduct the negotiations (Def. Ex. 149, App. 1107a). Immediately thereafter he conferred with the General Counsel of General Motors and found that General Motors did not intend selling the Opel plant.[30]

The significance of this abortive affair lies simply in the fact that it establishes once again that, shortly before the entry of the United States into the war, appellant, even though in the United States, was not only willing to act as his father's representative, but also as a representative of the German government. It thus follows the consistent pattern demonstrated by appellant's other activities as herein outlined, and shows that this pattern continued unchanged as late as February 1941.

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[30] Appellant's suggestion (Br. p. 43) that this matter was "thrust" upon him does not explain why he was willing to register as a foreign agent and conduct negotiations with General Motors when there was no compulsion involved. His further suggestion (Br. p. 43) that he acted because he feared for his father's safety is not only not supported by any evidence in the record, but is manifestly contrary to the facts. If his father had been in any personal danger from the German officials, they would hardly be sending coded messages for him through diplomatic channels. Moreover, appellant's father, a member of the Nazi party and other Nazi organizations, received a medal and a personal telegram of congratulations from Hitler in the same year, 1941 (Former App. 115, 165-166).

Appellant, to overcome the effect of this overwhelming assemblage of adverse facts, points to the "uncontradicted" testimony of Colonel Mettler and Irwin Schattman as establishing that he in fact was loyal to the United States and attempted to aid the United States. With respect to Colonel Mettler, his testimony was that while appellant was interned as an alien enemy, appellant furnished some information concerning the desirability of bombing the ball-bearing plants located in Schweinfurt, Germany and also some information concerning inventions of appellant which were allegedly valuable to our war effort (App. 173a-175a). Appellant does not mention, however, that far from being "uncontradicted", Colonel Mettler was confronted with his own reports to Washington (Def. Exs. 118-120, App. 987a-999a) which show that little detailed information was furnished by appellant. Moreover, Colonel Mettler, in such reports, expressed his own view that appellant was more interested in Germany than in the United States, that appellant had a high opinion of the superiority of the German race, and stated the fact that appellant's suggestions, which had been made to obtain a release from internment (App. 182a), had not been received with any credence (App. 181a, 182a; Def. Exs. 119, 120; App. 998a, 1003a). Further it should be noted that Colonel Mettler was the officer in charge of a branch office of Military Intelligence in Miami at the time in question. (App. 173a). For reasons best known to himself, he requested that appellant be kept in Miami while in internment, but such requests were not approved by headquarters in Washington (App. 184a). It was thus obvious that appellant was attempting to use Colonel Mettler as a means of insuring continued pleasant internment in Miami rather than internment in the regular and less desirable camps. Far from ignoring this evidence, therefore, as stated by appellant (Br. p. 14), the District Court properly concluded, after considering all of it, that the record did not support appellant's contention that he contributed to the United States war effort (133 F. Supp.

625, App. 53a, 54a), and found that any information which appellant may have supplied was not furnished with intent to further the interest of the United States (Fdg. 98, App. 83a).

The same observations are true with respect to the testimony of Schattman. He was the President of Westminster Industrial Corporation, a financing corporation wholly owned by Uebersee, and also President of Westminster's wholly owned subsidiary Ergo Machine Works (App. 155a, 167a). The Custodian vested all of the stock of Westminster, and the proceeds thereof are part of the property in suit. It is true that Schattman testified that Ergo was engaged in some defense production and that appellant assisted in the development of a process for hot pressing of non-ferrous metals in which the Office of Production Management was interested (App. 157a). Schattman's own affidavit of 1942, introduced by appellant, showed, however, that appellant was afraid to leave the United States lest he be denied permission to re-enter and that appellant was deliberately staying in localities remote from defense activities to show that he was not a Nazi sympathizer (Int. Ex. 1, App. 815a, 816a). Moreover, it was apparent that Schattman's family was friendly with the von Opels, that his earnings increased considerably through his employment with Westminster and Ergo, until the Alien Property Custodian, after vesting, refused to continue the activities of Ergo which was operating at a loss and Schattman resigned (App. 164a, 167a, 168a). Here again, the District Court did not "ignore" the evidence, but was amply justified in concluding that the record did not support appellant's contention that he was aiding the war effort of the United States (133 F. Supp. 625, App. 53a, 54a) and that appellant did not intend to further the interests of the United States (Fdg. 98, App. 83a).

Appellant argues (Br. pp. 34, 39) that enemy taint should be restricted to conduct after the United States becomes a belligerent or to conduct in relation to a tainted corporation. Plaintiff Uebersee, in the prior appeals to this Court and the Supreme Court, also argued that there must be proof of hostile acts or use of property against the interests of the United States after this country enters the war. This Court rejected such argument *sub silentio;* the Supreme Court noted it and rejected it in emphatic terms, stating:

> It is suggested that vested property must be returned unless there is proof of actual use of the property for economic warfare against the United States. The crucial fact is not the actual use by an enemy-tainted corporation of its power in economic warfare against the United States. It is the existence of that power that is controlling and against which the Government of the United States may move. The Government does not have to wait for the enemy to do its worst before it acts. Cf. *Miller* v. *United States (Page* v. *United States)* (U.S.) 11 Wall. 268 at 306. (343 U.S. 212).

Nor is there any basis for suggesting that the conduct which constitutes taint must be related to a tainted corporation or to the property in suit. The clear and consistent purpose of the Act is to deny recovery to persons who have associated themselves with the enemy. If they have done so, the privilege of recovery is withdrawn from them. Thus, as this Court has recently held, a person actually employed by an enemy government, and therefore an enemy because an agent of such government, is barred from recovering property in no wise related to such agency. *Hansen* v. *Brownell* (C.A. D.C.) No. 12954, May 10, 1956.

On the facts as found, the District Court was fully justified in concluding that appellant acted for and on behalf of and as an agent of the enemy and enemy nationals and was thus enemy tainted. Since appellant's entire activities were on behalf of or as agent of the enemy or enemy nationals, it would plainly frustrate the purposes of the Trading with the Enemy Act to permit him to recover merely because of a technical neutral citizenship.[31] When it is recalled that, as shown by the correspondence with von Bibra, appellant acquired such neutral citizenship for the express purpose of preventing the seizure of the very assets in suit by this country in order to preserve them for Germany, it becomes manifest that to deny the existence of a concept of individual enemy taint and to permit recovery by appellant would make a mockery of the Trading with the Enemy Act.[32]

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[31] Appellant argues (Br. p. 30) that if persons may become enemies by virtue of enemy taint, practical difficulties are created since

IV

The Doctrine of Res Judicata Was Properly Applied

As previously noted, the District Court, on motions of appellee, entered two orders prior to trial applying the principles of *res judicata* to appellant's claim. The first order (App. 32a), entered June 18, 1954, provided that neither party could offer evidence to contradict or vary the findings previously made, except that additional evidence might be offered on the issues of appellant's enemy status, his enemy taint or the value of his severable interest in the property. The second order (App. 36a), entered January 4, 1955, provided that the value of appellant's sever-

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such persons are an undefined class and yet, under Section 3 of the Act, it is unlawful to trade with an enemy. But a person or corporation in a neutral country and doing business within enemy territory may also be an enemy with whom trade is prohibited. Appellant does not suggest in what manner a person in the United States may satisfy himself that the neutral person with whom he deals has not become an enemy by reason of business done in enemy territory.

[32] Appellant suggests (Br. p. 25) that control by enemies is the proper test. If so, *cf. Miller* v. *United States*, 11 Wall. 268, it is amply satisfied by the findings that appellant's activities for plaintiff Uebersee were carried on under the guidance and direction of his father (Fdgs. 44, 45 App. 67a, 68a), that he exercised or failed to exercise his interest under the usufruct "in complete subordination to the will of his father" (343 U.S. 211), and that as summarized above, appellant continuously acted as representative or agent of and on behalf of his father and, in fact, extended his aid to the enemy and contributed to its resources. These facts abundantly demonstrate control of appellant by the enemy and enemy nationals.

able interest should be determined according to German law, and not Swiss law, since German law had previously been applied to determine the extent of the usufruct interests. Both orders were preceded by opinions of the District Court, reported at 121 F. Supp. 420 and 127 F. Supp. 42, respectively (App. 21a, 34a). Appellant challenges both of these orders (Br. pp. 64-87) upon the ground that *res judicata* could not properly be applied to his cause of action. Since, in appellee's view, *res judicata* was clearly applicable herein, a brief discussion of the law and its relation to the facts herein is therefore necessary.

It is, of course, well settled that the doctrine of *res judicata* is applicable to persons who were parties to prior litigation and to persons in privity with such parties. It is also well settled that persons, not parties, who controlled prior litigation, individually or in cooperation with others, and who have a financial or proprietary interest therein, are in privity with the actual parties under this rule. *Restatement of Judgments,* section 84. The decisions of the courts unanimously support this view. *Souffront* v. *Compagnie des Sucreries,* 217 U. S. 475; *Lovejoy* v. *Murray,* 3 Wall. 1; *Buzard* v. *Helvering,* 64 App. D. C. 268, 77 F. 2d 391; *Caterpillar Tractor Co.* v. *International Harvester Co.,* 120 F. 2d 82 (C. A. 3); *E. I. DuPont de Nemours & Co.* v. *Sylvania Corp.,* 122 F. 2d 400 (C.A. 4); *Hauke* v. *Cooper,* 108 Fed. 922 (C.A. 5); *Ocean Accident & Guarantee Corp.* v. *Felgemaker,* 143 F. 2d 950 (C.A. 6); *Doherty Research Co.* v. *Universal Oil Products Co.,* 107 F. 2d 548 (C.A. 7); *Box* v. *Rundell,* 179 F. 2d 626 (C.A. 10); *United States Envelope Co.* v. *Transco Paper Co.,* 221 Fed. 79 (D.C. Conn.); *Davidson* v. *I. M. Davidson Real Estate and Investment Co.,* 249 Mo. 474, 155 S.W. 1; *Dishinger* v. *Bon Air Catering Co.,* 336 Ill. App. 557, 84 N.E. 2d 562; *cf. Robbins* v. *City of Chicago,* 4 Wall. 657.

As stated by the Supreme Court in *Souffront* v. *Compagnie des Sucreries, supra,* 217 U. S. at p. 487:

> The case is within the principle that one who prosecutes or defends a suit in the name of another to establish

> and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record.

To the same effect, see the decision of this Court in *Buzard* v. *Helvering,* 64 App. D.C. 268, 77 F. 2d at p. 395.

The rule has specifically been applied to situations in which a stockholder of a corporation participated in and controlled litigation conducted in the name of the corporation. *United States Envelope Co.* v. *Transco Paper Co. supra; Davidson* v. *I. M. Davidson Real Estate and Investment Co., supra; Dishinger* v. *Bon Air Catering Co., supra.*

The tests of control of litigation within the meaning of this rule are succinctly set forth in the *Restatement of Judgments,* Section 84, Comment (e), as follows:

> In order that the rule stated in this Section should apply it is necessary that the one in whose favor or against whom the rules of res judicata operate participate in the control of the action and if judgment is adverse, be able to determine whether or not an appeal should be taken. It is not sufficient that he supplies the funds for the prosecution or defense, that he appears as a witness or cooperates without having control. It is, however, sufficient if he is one of a group which controls the proceedings abiding by the will of the majority and consenting to what is done. The fact that the party whose action or defense he controls could withdraw consent to his exercise of control and hence could terminate his control at any time, does not, however, affect the operation of the rule stated in this Section; as long as such consent exists, the control is as effective as if the consent were non-terminable.

As stated in *Lovejoy* v. *Murray, supra,* a person should be bound by proceedings to which he is not a stranger, and the term parties includes all persons who are directly interested in the subject matter and had a right to control the proceedings and to appeal from the judgment.

Appellant did control the prior proceedings in this action. The findings of the District Court as to such control were unchallenged by him in the court below and hence cannot be challenged here. As the Court found, appellant retained counsel to prosecute the action, assisted in the preparation of the case for trial and in the trial itself, appeared as plaintiff's chief witness, procured the affidavit of a witness submitted as the basis of a motion for a new trial, authorized the retainer of new counsel to prosecute the appeal from the prior judgment of the District Court, and on behalf of plaintiff Uebersee signed the authorization for such appeal (121 F. Supp. 425, App. 28a).

There is no inconsistency, as appellant urges (Br. p. 67), between this finding of control of the litigation and the Court's prior findings that Wilhelm and Marta von Opel controlled plaintiff Uebersee. The question here is not who controlled the plaintiff corporation, but who controlled the litigation; clearly this was done by appellant. Moreover, as pointed out in the *Restatement of Judgments,* Section 84, Comment (e) *supra,* it is sufficient if appellant was a member of a group which controlled the litigation, and it is immaterial that other members of the group could have withdrawn their consent to appellant's control as long as the consent continued to exist and the control remained in effect.

The cases cited above also require that there exist some financial or some proprietary interest of the party who is charged with control of litigation. Demonstrably, appellant had such an interest. As appears from the record of the former appeal, which is part of the record now before this Court, and the briefs of plaintiff Uebersee submitted to this Court on the prior appeal, plaintiff Uebersee's case throughout was argued on the basis that appellant was the sole beneficial stockholder of plaintiff Uebersee and that no one else had any interest in its assets. It was further argued that there was no usufruct in favor of appellant's parents, that if there was a usufruct it was waived and that the plaintiff corporation was controlled not by Wilhelm von Opel, but by Fritz von Opel. If the corporation had been successful in urging these claims, it presumably would have recovered the vested assets, and these assets would have inured to the benefit of the corporation's alleged sole beneficial stockholder, appellant. Moreover, on the first trial the Court deemed it appropriate to examine the status of appellant and the "enemy tendencies of the neutral" (82 F. Supp. 606), since it was claimed that he had some interest in the property upon the death of his parents and the consequent termination of the usufruct. It did so, and made numerous findings as to appellant's "technical" Liechtenstein citizenship, his sympathy for Germany, and his activities in expediting Hungarian production for shipment of bauxite to Germany. The financial or proprietary interest which appellant had in the property in suit was the same interest as has been put in issue by his complaint in intervention. He thus had an "interest in a subject matter or transaction involved in the action" and participated therein "in order to secure an adjudication upon the facts with reference to such subject matter or transaction." *Restatement of Judgments,* Section 84, Comment (c).

The question remains, to which issues should the rules of *res judicata* be applied. Since the cause of action now asserted by appellant is admittedly different from the corporation's cause of action, his cause of action was not barred. Instead, he is barred only by the adjudication of issues directly determined by the Court as a ground of recovery or defense. *Partmar Corporation* v. *Paramount Pictures Theatres Corp.,* 347 U. S. 89; *Commissioner* v. *Sunnen,* 333 U. S. 591; *Oklahoma* v. *Texas,* 256 U. S. 70; *Southern Pacific R. Co.* v. *United States,* 168 U. S. 1; *Cromwell* v. *County of Sac.,* 94 U. S. 351. What were then the issues which were previously litigated and determined as a ground of recovery or defense? Clearly the usufruct agreement and its effect on the rights of the parties thereto under German law were determined in order to ascertain whether there was any enemy ownership and therefore any enemy taint of plaintiff Uebersee. Clearly also, the facts as to who controlled the management and affairs of plaintiff Uebersee, and the Court's determination that this control was exercised by Wilhelm von Opel, were necessary to reach the conclusion that the plaintiff corporation was controlled by enemies and therefore enemy tainted.

Similarly, appellant's personal status was also necessarily determined in view of the fact that he had an interest in plaintiff corporation and in its vested assets upon the termination of the usufruct upon the death of his parents. On these issues, the District Court determined after the first trial that there was a substantial enemy ownership interest outstanding in favor of appellant's parents and that the plaintiff corporation was exclusively controlled by Wilhelm von Opel or his agent. It was determined that appellant's Liechtenstein citizenship was a mere matter of "technical form" and that his activities and statements in the interest of Germany as heretofore summarized, including his activities in expediting bauxite production in one enemy country, Hungary, for shipment to another enemy country, Germany, were further evidences of enemy taint. The judgment entered upon these findings was affirmed by this Court and by the Supreme Court. The Supreme Court not only approved the findings of enemy ownership and control, but also the findings relating to appellant's personal status, quoting with approval the District Court's statement on that subject that "the neutral aspect of ownership in the property is insignificant." (82 F. Supp. 606, 343 U. S. 212).

Appellant argues (Br. pp. 65-67) that the principles of *res judicata* cannot be applied herein because there was no final judgment in the action brought by plaintiff Uebersee. He bases this argument upon the fact that the judgment was vacated by the Supreme Court when the case was remanded for the consideration of his rights. Appellant, however, misreads the opinion and mandate of the Supreme Court. It did not remand the case for a new trial, but remanded it solely for the consideration of the rights of appellant under his claim of a separate interest. As the

Court itself twice stated, "the judgment is affirmed" (343 U. S. 213). The intention of the Supreme Court was clear. It fully agreed with the decisions of the District Court and this Court holding plaintiff Uebersee barred from recovery, but vacated the judgment merely to permit the consideration of a new claim of a separate interest in appellant which had not been previously determined.[33] In all other respects the judgment is patently final. If it were not, plaintiff Uebersee would equally have the right to relitigate issues upon which it had been unsuccessful and the decisions of all the courts would have been to no avail. Although represented by the same counsel, plaintiff Uebersee did not attempt to relitigate any rights upon the second trial and, of course, could not have done so.

Appellant relies (Br. p. 66) on the statement in the *Restatement of Judgments,* Section 41, to the effect that a judgment is not conclusive if vacated by the trial court or reversed by the appeal court. This rule has no application here, since the judgment clearly was not vacated by the trial court nor was it reversed either by this Court or the Supreme Court. Moreover, in Comment (c) to the same Section of the *Restatement,* it is stated that "a judgment may be final as to some matters in litigation, although the litigation continues as to other matters."[34] Thus, for purposes of the application of *res judicata* the judgment was clearly final.

Appellant further urges (Br. pp. 70-72) that *res judicata* applies only to ultimate issues. The findings of ownership and control of plaintiff Uebersee by enemies as well as the additional taint caused by the status of appellant were the basis upon which the District Court found the plaintiff corporation to be enemy tainted. This Court found that the case did not involve a " 'diluted' taint", and the Supreme Court found that the property was Wilhelm von Opel's to do with as he saw fit and that the neutral aspect of ownership was insignificant. Obviously, these were the ultimate determinations of fact leading to the legal conclusion that the plaintiff corporation was enemy tainted and could not recover.

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[33] This judicial technique was necessary since the Supreme Court does not have original jurisdiction to permit appellant's intervention. *The William Bageley,* 72 U.S. 377, 412.

[34] "Likewise a case remanded for further hearing on small issues, or of which the court retains jurisdiction for some purposes, may nevertheless be final as to other issues determined." (65 Harv. L.R. 835).

The Supreme Court has clearly stated the standards to be applied in ascertaining what determinations in prior litigation may be binding in subsequent litigation, saying:

> What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties, and the findings and opinion of the Court . . . (*Oklahoma* v. *Texas,* 256 U.S. at p. 88).[35]

Those standards the District Court applied in this case.

Appellant also argues (Br. pp. 67-68) that a stockholder is not in privity with his corporation and that consequently determinations made in the corporation's suit are not binding upon him. In this argument appellant betrays the same confusion which he exhibited in the District Court. The prior findings were not held to be binding because appellant was a stockholder of plaintiff Uebersee, but rather because he controlled and participated in litigation to which his corporation was a party, in aid of his own interest. The cases cited by appellant in support of this argument (Br. p. 68) do not involve the problem of control of litigation but merely relate to the question whether a stockholder as such is bound by determinations in a suit to which his corporation was a party. Thus, the District

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[35] Appellant's citation of *The Evergreens* v. *Nunan,* 141 F. 2d 927 (C.A. 2), distinguishing between ultimate and mediate facts is thus not in point, since the findings relied upon were clearly ultimate. Moreover, to the extent that *The Evergreens* might be given any other interpretation, it has not been followed by the Supreme Court, which, on the contrary, merely cited it for the proposition that questions of fact essential to a judgment are binding in subsequent litigation. *Commissioner* v. *Sunnen, supra,* at p. 601.

Court properly distinguished these cases as involving a situation where the corporation is treated as a separate entity. The conclusions of the District Court are amply supported by the numerous authorities cited in this brief (p. 70 *supra*) holding that a party controlling litigation in aid of his own interest is bound by the determinations therein, whether he be a stockholder of the corporate party or not.

Appellant states further (Br. pp. 72-73) that his personal enemy taint was not involved upon the first trial. This assertion is clearly belied by the opinion and findings of the District Court made at the conclusion of that trial (82 F. Supp. 606; Fdgs. 5-10, 44, 45, App. 60a, 61a, 67a, 68a). He further states that the Government did not consider that his taint as a stockholder was material. This statement is inaccurate. In its brief to this Court on the prior appeal (pp. 54-58) the Government specifically argued that the findings of the District Court on this subject were sufficient to justify classifying appellant as an enemy and were an additional element of Uebersee's enemy taint.[36] In its brief to the Supreme Court, the Government similarly argued that the enemy taint of appellant was properly considered by the District Court and that the findings thereon were correct. The Supreme Court, in its opinion, did approve such findings, quoting the statement of the District Court in its prior opinion that "the neutral aspect of ownership in the property is insignificant" (343 U.S. 212). This statement in the District Court's opinion was made in the context of the consideration of the personal status of appellant and, of course, was quoted by the Supreme Court in its proper context.[37]

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[36] Appellant is correct, however, in stating that this Court did not pass on this issue. This Court found sufficient evidence of Uebersee's enemy taint to bar recovery on other findings and deemed it unnecessary to consider this aspect of the case.

[37] This fact also is the answer to appellant's argument (Br. p. 74) that *res judicata* is not applicable because the judgment was affirmed on the separate ground of enemy ownership and control of Uebersee. Furthermore, this was not a separate ground, since the District Court had found after the first trial that appellant had

Appellant further argues (Br. pp. 73-74) that his property interest under the usufruct was not involved upon the first trial. Although appellant admits that the Court had to and did determine the rights of the parties under a German usufruct, he maintains that it did not determine his rights. This statement is self-contradictory. The District Court clearly found that appellant had legal title to the shares of Uebersee but that his parents, as usufructuaries, had various *in rem* rights therein, including a right to co-possession, a right to the income, a right to the voice in the management, a right to prevent the disposition of the shares and a possible right to vote (Fdg. 52, App. 69a). These rights necessarily delimited those of the legal owner, appellant. The further findings of the District Court that plaintiff Uebersee was controlled by Wilhelm von Opel or his agent also delimited appellant's rights. It was these findings which led the Supreme Court to conclude that appellant had bare legal title, that his interest was completely subordinated to that of his father, and that he exercised or failed to exercise such rights in accordance with the will of his father (343 U.S. 210-211).

Appellee conceded in the Court below, and still concedes, that the *value* of appellant's interest under the usufruct was not previously determined, and consequently did not urge the application of *res judicata* to this issue. The District Court likewise permitted additional evidence on this point. What appellant really wants, however, as demonstrated by the statements in his brief (pp. 82-83), is an opportunity to prove that there was in fact no usufruct or that the necessary co-possession was lost by the "sale" to some 15 unknown Swiss purchasers (a contention specifically rejected by this Court on the prior appeal),[38] or that the usufruct was waived. He thus wants an opportunity to prove the exact opposite of the facts as found and affirmed by the courts on the prior appeal. Since these

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legal title to the stock of Uebersee. It was, therefore, proper to consider, as the District Court did, the status of appellant as legal title holder in determining the entire question of enemy taint and this approach was approved by the Supreme Court.

[38] See footnote 6, p. 21 *supra*.

facts were determined in litigation which he controlled in support of his own interest, he is subject to the same rules as any other litigant and may not have a second day in court to prove facts which he failed to establish in a prior trial.

Finally, appellant argues (Br. p. 66) that if *res judicata* is applicable herein, the remand of this case by the Supreme Court was useless. Appellant was not a formal party to the litigation in the prior proceedings or before the Supreme Court. That Court, therefore, could not determine the claim advanced before it that he had a separate and independent right to recover as an innocent stockholder of Uebersee. In view of the claim advanced on appellant's behalf by Uebersee, the Supreme Court remanded the case to afford an opportunity for the determination of such claim. In such remand, however, the Supreme Court did not suggest in any manner that appellant was entitled to a new trial of the issues previously determined. To the contrary, it remanded the case "for consideration in the light of Kaufman and *this opinion,* of any application that may be made on behalf of Fritz von Opel" (343 U.S. 213) (Italics supplied). The language used by the Court clearly indicates that the further proceedings to determine appellant's rights would be made on the record and in the light of its opinion in this case.

Under these circumstances and in view of the fact that *res judicata* was clearly applicable to appellant herein, he can hardly complain, as he does (Br. p. 70), that the District Court permitted additional evidence to be introduced on the issues of his enemy status and enemy taint. This approach was adopted by the District Court obviously as a matter of precaution in order to make sure that the record was complete on these issues. Appellant thus had a full opportunity to adduce facts which would show that he was not an enemy within any of the applicable definitions. Indeed, he attempted to do so upon direct examination without objection by appellee and testified to the effect that he was merely helping his father as a matter of filial devotion. He also introduced the testimony of several witnesses as to his alleged anti-Nazi sympathies (App. 153a-191a, 485a, 502a-514a) and his efforts to aid the United States during the war (App. 153a-185a). Such testimony, however, was squarely contradicted by the evidence adduced by appellee, including his cross-examination of appellant. In any event, however, appellant had a full and complete opportunity to meet these issues on the second trial, notwithstanding the prior determinations, and cannot now complain that he was unsuccessful.

What has been said in the preceding pages is largely dispositive also of appellant's attack on the second order of the District Court entered January 4, 1955, determining that German law controls the evaluation of appellant's interest under the usufruct (App. 36a). The District Court on the first trial determined that German law was applicable in interpreting the usufruct agreement. Its findings on the German law were specifically approved by this Court and by the Supreme Court. Thus, a determination of conflict of laws or choice of law had been made. This was a determination of law which is as binding under *res judicata* as are determinations of fact. *Oklahoma* v. *Texas, supra; Commissioner* v. *Sunnen, supra; Southern Pacific R. Co.* v. *United States, supra; Rew* v. *Independent School District,* 125 Ia. 28, 98 N.W. 802. *In Mitchell* v. *First Nat. Bank of Chicago,* 180 U.S. 471, the Supreme Court rejected the contention that in a second proceeding by the same parties on a different cause of action, the unsuccessful party could assert that Illinois law should be applied to a transaction which had been previously adjudicated under Connecticut law. The Court held that such a determination of choice of law was binding on the parties until reversed.

The fact that such choice of German law was made at the first trial without objection by either party is immaterial. Such a determination is binding even if expressly conceded. *Tait* v. *Western Maryland Railway Co.,* 289 U.S. 620; *Tillman* v. *National City Bank,* 118 F. 2d 631 (C.A. 2).

It is apparent, therefore, that the prior determination of the applicability of German law to the usufruct is binding upon appellant herein. It is also apparent that both

German and Swiss law cannot be applied to the same usufruct. It is anomalous to say that the parents as usufructuaries may have the rights conferred on such persons by German law, but that appellant, as a party to the same agreement, may have the rights conferred upon the legal titleholder by Swiss law.

In view of the application of *res judicata* appellant's extended argument as to the proper rules of conflict of laws (Br. pp. 78-81) is wholly immaterial. Appellant's true complaint is not that he was deprived of an opportunity to offer evidence as to the evaluation of his interest under Swiss law. In fact, he made no effort to prove the circumstances of such evaluation under Swiss law prior to the entry of the order of the District Court now challenged. Several months prior to such order, appellant took the deposition of an expert on Swiss law, but this expert did not testify on that point. Appellant really seeks to prove, as demonstrated by such deposition, that under Swiss law there would be no usufruct at all. As appellant frankly states (Br. pp. 82-83), he was deprived of the opportunity to establish that the co-possession of the usufruct property necessary for the establishment of a usufruct under Swiss law did not exist, or that if it did, such copossession was lost and the usufruct destroyed by the tax avoidance "sale" to unknown Swiss purchasers in 1936. In the same action in which it has been determined that plaintiff Uebersee was enemy tainted by reason of enemy ownership and control under a usufruct, appellant seeks to prove that there was no usufruct and consequently no enemy ownership or control. He therefore seeks to establish his claim upon a state of fact not only independent of, but contradictory to, the facts previously determined. This is contrary to orderly concepts of judicial procedure and the well-established principles of *res judicata*.

Since appellant participated in the control of the prior litigation in this case and had an interest therein, he was in privity with plaintiff corporation and the principles of *res judicata* were properly applicable. There was no error by the District Court in entering the two pretrial orders now challenged.

V

The Findings on the Evaluation of Appellant's Severable Interest Are Correct

Appellant attacks the findings of the District Court as to the evaluation of his severable interest in the property as unduly limiting the value of his interest (Br. pp. 84-87). The District Court entered such findings in order that the record might be complete if its findings as to appellant's right to recover were not sustained.

The District Court found, without dispute, that a usufruct is a personal and non-transferable right which terminates upon the death of the usufructuary (Fdg. 100, App. 83a). Since both parents were alive on the date of vesting (Fdg. 56, App. 70a), it further found and concluded that the interest of appellant in the usufruct property was of no value during the life of the usufruct (Fdgs. 101, 102, App. 84a; 133 F. Supp. 626, App. 56a). It based these findings upon the evidence and its prior determinations that Wilhelm and Marta von Opel had, in addition to their legal usufruct interest, full powers of control and disposition of the usufruct property. This was also the conclusion of the Supreme Court on the last appeal, when it said that plaintiff Uebersee was, to the extent of 97%, "owned, managed, used and controlled by Wilhelm von Opel, a national of Germany. The findings demonstrate that petitioner [Uebersee] was a corporate holding company acquired for the purpose of enabling Wilhelm to control and use his property as he saw fit. His interest was paramount and controlling" (343 U. S. 211).

Appellant complains (Br. pp. 84-85) that the District Court, in its opinion after the first trial, and in its opinion after the present trial, found that the usufructuaries had "other interests" in the property involved. Since under German law a usufructuary has only a right to co-possession, a right to a voice in the management of the property, a right to prevent sale of the property, and a possible right to vote the shares (Fdg. 52, App. 69a), it is manifest that the District Court was referring to the unlimited powers of control and disposition of Wilhelm von Opel over the usufruct property found to exist, as the "other interests" therein. It is undisputed that such additional rights may be conferred upon the usufructuary by agreement of the parties (App. 134a, 135a, 611a). Appellant also makes the astounding statement (Br. p. 85) that the Supreme Court on the last appeal did not refer to any "additional rights" in the usufruct property. The opinion of the Supreme Court, however, quotes with approval Finding 52 of the District Court on the first trial, which defines the rights of usufructuaries under German law, and then proceeds to find that the property was "owned, managed, used and controlled" by Wilhelm von Opel, and that the property was his to use "as he saw fit" (343 U. S. 211). Surely, this goes far beyond the rights of usufructuaries under the German law as established, and is an explicit finding of "additional rights" in the property.

At the present trial appellee introduced the testimony of Dr. M. Magdalena Schoch as an expert on German law, the same expert whose conclusions had been adopted on the first trial. Her testimony disclosed that with respect to the evaluation of usufruct interests, German courts will examine not merely legal interests but the beneficial or economic ownership of the property as well. She introduced two decisions of the German Reich Tax Court, the court of last resort in the field of taxation in Germany, supporting that conclusion (Def. Exs. 153, 154, App. 1114a, 1119a). The first of these decisions concerned a usufruct created by parents, with their children as legal owners of the property. Under the usufruct agreement there involved, the parents retained full control of the usufruct property during their lifetime. The German Tax Court held that it must look to the beneficial or economic ownership of the property, that such ownership was retained by the parents in that case, and that consequently, they should bear the full burden of the tax levied upon such property.

This decision was direct authority for the finding of the District Court that appellant's interest in the property, under almost identical facts, was without value during the life of the usufruct (Fdg. 102, App. 84a). It found, however, contrary to appellee's contentions, that this did not destroy the interest of the legal owner, appellant, upon the termination of the usufruct. This interest was the right to receive the usufruct property then remaining, subject to the usufructuary's rights to use, control and dispose of the property during his lifetime (Fdgs. 103, 104, App. 84a; 133 F. Supp. 626, App. 57a, 58a). Consequently, it held that appellant's interest would be evaluated under sound principles of accounting by applying German life expectancy tables to the estimated income of the parents as of 1941, and by taking into account the intention of the parties, i.e., the rights of the usufructuaries to control, use and dispose of the property as they saw fit (Fdg. 105, App. 85a; 133 F. Supp. 627, App. 58a). Based upon the evidence of German law as applied to the facts involved, there was clearly no error in these findings.

Appellant's objection to the finding of "other interests" is thus addressed to this last qualification. He wishes to have his interest in the property evaluated as that of a full legal owner under German law. But under the prior findings of the District Court, as expressly confirmed upon appeal, appellant does not have such rights, but only a right to such property as may remain after the usufructuaries have exercised their full powers of control and disposition during their lifetime.

Appellant also objects (Br. pp. 86-87) that the District Court was in error in determining itself bound by this Court's prior determination that appellant's right to 20% of the income of the property was only a contract right against his parents, not a right *in rem* (89 U. S. App. D. C. 167, 196 F. 2d 559). Since the principles of *res judicata* were applicable herein (Point IV, *supra*), the District Court had no other choice. Appellant claims, however, that the stated conclusion of this Court, made in response to plaintiff Uebersee's specific request for clarification of this Court's opinion on the prior appeal, was not adopted by the Supreme Court. The Supreme Court unanimously affirmed the judgment of this Court, however, and in doing so referred to the "right" of appellant to receive 20% of the income. Nowhere in its opinion did it attempt to specify what type of right this was, nor did it state that this was a right *in rem*. It did, however, adopt the District Court's statement that "the neutral aspect of ownership in the property is insignificant" (343 U. S. 212), a statement hardly consistent with an *in rem* right to 20% of the income. Clearly, the Supreme Court was not required to enunciate specifically each finding which it approved in unanimously affirming the judgments of the courts below.

Moreover, this issue was fully litigated upon the first trial of this action. Expert testimony on German law as to the effect of the provision for 20% of the income to appellant was adduced by both sides. Most significantly, in the "Gold" case, appellant himself referred to this interest, not as an *in rem* right, but as "mere legal title plus 20% of the dividends and interest" (Def. Ex. 8, Former App. 2001). And the attorneys whom he retained to prosecute that action expressly stated that this right was a mere personal right against his parents, not an *in rem* interest in the usufruct property. Surely, the intent of the parties as expressed by them is the best evidence of the true meaning of that provision.

Appellant has thus had a full opportunity to litigate this issue. Appellant also, controlling the prior aspects of this litigation, solicited the view of this Court on the very issue now questioned. Having been unsuccessful, he is not entitled to a second opportunity to litigate that matter.

VI

No Constitutional Question Is Involved

Appellant argues finally (Br. p. 88) that the judgment below violates his constitutional rights because he is a "friendly alien" as a citizen of Liechtenstein. While the Fifth Amendment requires that friendly aliens be paid just compensation for the confiscation of their property, *Guessefeldt* v. *McGrath,* 342 U. S. 308; *Silesian-American Corp.* v. *Clark,* 332 U. S. 469, the United States, under its war powers, may constitutionally seize or confiscate the property of its enemies, *Silesian-American Corp.* v. *Clark, supra; United States* v. *Chemical Foundation*, 272 U. S. 1; *Miller* v. *United States,* 11 Wall. 268. The decision of the Supreme Court in *Miller* v. *United States, supra,* fully answers appellant's contention. The Court there stated, at page 306:

> Any property which the enemy can use, either by actual appropriation or *by the exercise of control over its owner,* or which *the adherents of the enemy have the power of devoting to the enemy's use,* is a proper subject of confiscation. [Italics added.]

Appellant was, under the evidence and the findings, an "adherent" of the enemy and was subject to the control of the enemy. Consequently any property owned by him was a proper object of seizure or confiscation by the United States.

Moreover, appellant's status as a friendly alien is based entirely upon his Liechtenstein citizenship. But this citizenship was a mere "technical form" and the constitutional power of the United States may not be defeated by mere technicalities. In any event, since appellant had no "attachment, patriotism, sentiment, interest or loyalty" to Liechtenstein, his citizenship in that country, under established principles of international law, is not required to be given recognition by the United States. *The Nottebohm Case (Liechtenstein* v. *Guatemala),* fn. 26 p. 60 *supra.*[39]

---

[39] See also the dissenting opinion of the *ad hoc* judge appointed by Liechtenstein in that case, who stated: "It might be considered that a nationality acquired for the sole purpose of claiming the diplomatic protection of a neutral state cannot be invoked vis-a-vis the belligerent state against which the acts of concealment of enemy property were directed, on the ground that a legal act may be vitiated by fraud and that the respondent party is therefore justified in alleging that it is a nullity. The acquisition of nationality in such cases forms part of a transaction which is to be regarded as generally fraudulent, with the possible result that the injured *belligerent state may refuse to recognize the change of nationality,* and not merely that diplomatic protection cannot be relied upon." (pp. 64-65). [Italics supplied.]

Deprived of any recognition of that citizenship here, he remains, under our laws, a citizen of Germany whose property may constitutionally be seized or confiscated.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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Trading With the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U.S.C. App. 1-31):

Sec. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

* * * * *

Sec. 5 [as amended by the First War Powers Act of 1941, c. 593, Sec. 301, 55 Stat. 839]:

* * * * *

(b) (1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) Investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * * and the President may, in the manner hereinabove provided, take other and further measures not inconsistent herewith for the enforcement of this subdivision.

* * * * *

Sec. 9. (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, * * * may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

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APPELLANT'S REPLY BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,265—April Term, 1956

◆

FRITZ VON OPEL,

Appellant,

—v.—

HERBERT BROWNELL, JR., Attorney General, as successor to the Alien Property Custodian,

Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANT'S REPLY BRIEF

On the question of appellant's eligibility to bring this action as a nonenemy the briefs of appellant and appellee follow the same order of argument, namely, (I) whether appellant is a nonenemy or innocent stockholder of Uebersee Finanz-Korporation, A.G. adjudicated to be an enemy tainted Swiss corporation, and (II) whether after December 13, 1941 appellant was "resident outside the United States" and "doing business within" Hungary within §2(a) of the Trading with the Enemy Act. Appellee's brief then adds an alleged third ground of ineligibility, namely (III) whether appellant was an enemy by "enemy taint" apart from his position as stockholder of an enemy tainted corporation. Brief reply is here made seriatim to appellee's contentions on each of these points and then to his contention (IV) that *res judicata* was properly applied by the District Court.

I.

Appellant is eligible to recover as a nonenemy stockholder.

For clarity appellant's main argument on this point (Br. 21-46) was divided into consideration of (A) the legal question whether Congress authorized retention of any statutory nonenemy individual stockholder's aliquot share of the vested property of a tainted neutral corporation and, if Congress did, (B) the factual question whether appellant is a "tainted" stockholder by virtue of the enemy usufruct in his shares. The appellee does not answer appellant's arguments on the first question separately or directly except to maintain that the Supreme Court in the *Kaufman* decision (343 U. S. 156) by "innocent stockholder" must have "meant something more than a person who is merely not an enemy" (Br. 31). But this first legal question, and appellant's arguments thereon (Br. 22-34), must be dealt with before the factual question of the effect of the enemy usufruct on appellant's eligibility as a nonenemy stockholder can be reached.[1]

A. *All stockholders who are not statutory enemies may recover.* The fundament of any legal discussion of the seizure and retention of enemy property is that Congress, and Congress alone, can define the classes of enemies whose property may be retained subject to the protection to nonenemies against the taking of property for public use without just compensation protected by the Fifth Amendment.

---

[1] Appellant, not residing or present in enemy territory at any time during the war, is not a statutory enemy under the express definitions of §2 of the Act entirely apart from his change from German to Liechtenstein citizenship in 1939. *Guessefeldt* v. *McGrath,* 342 U. S. 308. The separate questions whether appellant is an enemy, ineligible to recover in this action, apart from his position as a stockholder of a tainted neutral corporation, are treated separately below in Points II and III.

In §2 of the Act Congress has defined these classes, principally persons resident in enemy territory but also persons resident outside the United States and doing business in enemy territory (§2(a)), agents of enemy governments (§2(b)), and special classes of enemy nationals, even though resident in the United States, if so proclaimed by Presidential proclamation (§2(c)). Congress defined as enemies not only corporations incorporated in enemy territory and corporations incorporated outside the United States and doing business in enemy territory (§2(a)), but also neutral corporations owned or controlled by enemies (§32(a)(2)(E)) and conveniently called "enemy tainted" neutral corporations.

But Congress has not extended the definitions of "enemy" to include individuals, as well as corporations, by ownership, control, or taint and in the absence of legislation the Court should not do so. The Government suggests, however, that in the *Kaufman* decision the Supreme Court has interpreted the statute as implying the Congressional intent that an individual stockholder of a neutral corporation, enemy tainted by control of persons residing in enemy territory, must establish something more than this lack of statutory enemy status and presumably must establish lack of that control by the enemy which tainted the corporation. But, as appellant argues in his main brief (Br. 22-30), there is no basis whatever in the statute or in its legislative history for this view that an individual not within the statutory definitions of "enemy" could nevertheless be an enemy by some undefined test of taint which is wholly absent from the statute. In the *Kaufman* case the Supreme Court did not attribute such a view to Congress. On the contrary, far from extending the definitions of "enemy," the Supreme Court attributed to Congress the intention to limit the definitions of "enemy" by authorizing recovery by nonenemy stockholders of enemy tainted neutral corporations. The Court stated that its holding "is based on the Act which enables one not an enemy *as defined in §2* to recover any interest, right or title which he has in the property vested. The innocent stockholder may not have title to corporate assets, but he does have an interest which Congress has indicated should not be confiscated merely because some others who have like interests are enemies." (Emphasis supplied, 343 U. S. at 160.)

The appellee asserts (Br. 36) that in the first part of the Supreme Court's *Kaufman* opinion "no reference is made to nonenemy stockholders" and argues that if the Court meant to include all nonenemy stockholders most of the opinion is *dictum* (Br. 36). But the Court does expressly mention "nonenemy stockholders" both in the preliminary part of the opinion (343 U. S. 158) and also in that part of the opinion nominated "First" (343 U. S. 159). The view that all statutory nonenemy stockholders are entitled to recover does not render the opinion *dictum* because the whole opinion is useful to explain the distinction between the eligible nonenemy stockholders and the statutory enemy interests in the corporation which taint the corporation. Moreover, throughout the present case the courts have distinguished between the interests of the Opel parents, statutory enemies because of residence in Germany, and of appellant, a neutral because at all relevant times outside of Germany and in fact present in the United States. The Supreme Court quoted the District Court's reference to appellant's interest in the property as the "neutral aspect of ownership in the property * * *" (343 U. S. at 212, 82 F. Supp. at 606).

Appellee relies on the statement in *Uebersee I* (332 U. S. at 488-9) that the definitions of "enemy" in §2 "are merely illustrative, not exclusionary." But this phrase must be read in the context of the Court's decision that neutral corporations, not individuals, might be enemies by reason of ownership or control by individuals who are statutory enemies, citing §32(a)(2)(E) of the Act which recognizes such a definition. But no place in the Act or judicial decisions is authority found for extending the definition of individual enemies in this manner.

The difficulties of appellee's interpretation urging a judicial test of "taint" or "innocence" of a neutral individual stockholder have already been discussed in appellant's main brief (Br. 29-33) and have not been answered in appellee's brief. These difficulties deserve emphasis. Is an individual nonenemy stockholder to be deprived of recovery of an aliquot share of corporate assets because he is not sufficiently "innocent" in his relationship with the management of the corporation *prior* to the declaration of war which for the first time makes that management an enemy? Or is his "taint" or "innocence" to be adjudged not merely by his prewar relationship to the corporate management which later becomes enemy management by declaration of war through no act or fault of the stockholder but also by his other prewar activities unrelated to the corporation, such as his prewar citizenship or residence in the country which becomes the enemy, or his expressions of friendly regard for the people of the nation which subsequently becomes our enemy? And is the stockholder to be adjudged an enemy by taint solely in respect of his interest in the tainted corporation, or is he also to be adjudged an enemy in respect of his individually owned property in the United States? The appellant earnestly submits that in the absence of any Congressional rule on these difficult questions the Court should hold that all stockholders who are not statutory enemies "as defined in §2" (343 U. S. at 160) are entitled to recover their aliquot shares of the vested property, including the appellant in this case.

The statute has ample scope without extending it to the dangerous and confusing extent urged by appellee. Stockholders of tainted corporations who reside in enemy territory, including corporations incorporated in enemy territory, and stockholders residing outside the United States and doing business in enemy territory, are denied recovery as well as stockholders who are agents of enemy governments or who are enemy nationals classified by Presidential proclamation as enemies. Stockholders who are allies of enemies, as defined in the Act, are denied recovery and neutral corporations owned or controlled by enemies are denied recovery. But American corporations and individuals not resident in enemy territory and present in the United States all during the war, including appellant, are entitled to recover. There should not be imputed to Congress different tests of eligibility of an individual to recover property depending upon whether the property is represented by shares in an enemy tainted corporation or is property individually owned.

B. *The parental usufruct does not make appellant a tainted stockholder.* If this Court holds that the statute requires a stockholder of an enemy tainted neutral corporation to establish his eligibility to recover by showing something more than his character as a technical nonenemy, it is submitted that the "something more" must be some factor involving the stockholder's own conduct after commencement of the war. The appellant contends that the fact that his gift from his parents, more than ten years before the war, was burdened with a usufruct cannot constitute a legal justification for confiscation of appellant's, as well as his parents', interest in the property. The appellee urges that appellant, unlike Kaufman, was an integral part of the plan for "enemy" ownership and control of Uebersee (Br. 32) and was the conduit through which Wilhelm von Opel, an "enemy," was enabled to keep property outside of Germany (Br. 33). But in determining any guilt or innocence of appellant's legal ownership of Uebersee's shares three all-important factors must be carefully weighed.

a. The gift by the Opel parents to appellant was made on October 5, 1931, more than ten years before Wilhelm von Opel became an enemy, and even appellee does not suggest that a purpose of the gift was the holding of the property in the United States for an enemy in a future war between Germany and the United States foreseen by Wilhelm von Opel in 1931. On the contrary, the Government states that a purpose of the gift was to keep property outside of Germany (Br. 33). But surely our Government cannot object to the desire of German nationals in 1931 to make large investments in American securities. Moreover, the District Court expressly found that a purpose of the gift was to make financial provision for appellant (Fdg. 18, R. 63a). If the donee's interest in this property is to be affected favorably or adversely by the fact that the commencement of the war ten years later made the donors enemies of the United States, instead of being penalized for transferring this property to the United States it would be more realistic to credit the parties for removal of the property from Germany, the future enemy.

b. There was never any concealment of the usufructuary interest of the Opel parents which became an enemy usufruct after December 7, 1941. On the contrary, the existence of the usufruct was openly asserted even in litigation with the Government in 1935 in the *Gold* case (Fdg. 49, R. 68a). The judicial determination that this usufruct continued to exist until December 7, 1941 may afford a basis for confiscation of the usufructuary interest but it does not afford any basis for the confiscation of the appellant's separate interest in the property. This factor of open and complete disclosure of the existence of the usufruct long before the commencement of the war completely answers appellee's suggestion that the parties engaged in some kind of scheme to preserve enemy property in the United States free from seizure during the war. The facts of this case are wholly distinguishable from the cases in which enemy interests have been concealed or property has been transferred in contemplation of seizure (Br. 38, ftnt. 11). Contrast also *Feller* v. *McGrath,* 106 F. Supp. 147, affirmed 201 F. 2d 670 (C. A. 3), cert. denied 346 U. S. 831.

c. It is not denied that the appellant wished to have the gift free and clear and opposed the usufruct, but his father insisted upon it (R. 238a). Appellant cannot be held to be a guilty or non-innocent stockholder because his parents reserved the usufruct. Appellee suggests that guilty or non-innocent conduct, depriving appellant of his very substantial interest in the vested property, is to be found in his participation in the execution of the gift in 1931 and in his establishment of the usufruct *in rem* in 1935, as the gift agreement obliged him to do, and in his natural prewar activity and interest in respect of these American investments which represented practically his entire property (Br. 33-34). Appellant earnestly submits that such perfectly innocent and normal prewar conduct cannot be made the basis for judicially labeling appellant as a guilty or non-innocent stockholder of Uebersee and is not a sufficient basis for the confiscation of his property, particularly in the absence of a clearly expressed Congressional intention to produce such a result.

Appellee's last suggestion on this point, to the effect that return of any of the vested property to appellant would be in effect a return to the surviving enemy usufructuary (Br. 37), is answered by the District Court's opinion (R. 58a) that apportionment between appellant as legal owner and the usufructuary during the usufruct would be based on the value, as of December 8, 1941, of the usufructuaries' right to receive the estimated income for the period of the life expectancy of the usufructuaries. In other words, if appellant is an eligible claimant the Government will retain that part of the property representing the value of the usufruct and the appellant will receive the remainder of the property free and clear of the usufruct. Appellee stands in the place of the surviving usufructuary and the judgment apportioning the vested property located here in the United States will bind the usufructuary who will have no interest in the property returned to appellant.

II.

Appellant was not resident outside the United States or doing business within Hungary after December 13, 1941.

A. *"Resident outside" the United States.* Appellant argues (Br. 54) that the basic statutory scheme is to control "any person in the United States" (§3) by making it a crime to trade with the enemy and to control persons outside the United States by seizing their property within the territorial jurisdiction of the United States. Appellant submits, however, that it was not the intention of Congress that a person present in the United States all during the war and subject to its complete jurisdiction, as was appellant, could also be classified as "resident outside the United States" because of a domicile outside the United States in Switzerland.

1. The statutory history does support appellant's construction because "resident within" enemy territory was stated by Mr. Montague, one of the managers of the bill in the House, to mean something less than domicile and more than presence in enemy territory and to include a

"sojourner staying or residing in" enemy territory (55 Cong. Rec. 4922). Appellant, present in the United States without interruption from May 1940 to 1950 was at least a "sojourner staying or residing in" the United States before and all during the war and therefore could not be "resident outside" the United States within the meaning of §2(a).[2]

Moreover, although the statute speaks expressly only of the two classes of "resident within" enemy territory and "resident outside the United States" it is clear that the statute thus intended to exempt from enemy classification the third class of persons, namely those resident in the United States during the war even though not domiciled here. The House report on the bill expressly states that the "enemy domiciled or resident in the United States is not included * * *" (H. R. Rep. No. 85, 65th Cong. 1st Sess., p. 2, quoted in *Guessefeldt* v. *McGrath,* 342 U. S. 308, 311). Surely Congress used the word "resident" in the same sense in §2(a) and in the House report and did not intend one factual test of resident in enemy territory to bring an individual under the Act and a different and more stringent test of resident in the United States to exempt an individual from the Act. Applying the statutory test of resident in enemy territory to appellant if he had voluntarily gone to Germany instead of the United States in 1940 and remained there during the war is it not clear that he would have been held to have been a resident of Germany under the authority of *Guessefeldt II,* 94 App. D. C. 155, 213 F. 2d

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[2] Appellee incorrectly suggests (Br. 42, Ftnt. 14) that the above quotation from Mr. Montague is contradicted by another part of his statement to the effect that prisoners of war, expeditionary forces and sojourners in enemy territory were not "resident within" enemy territory within the meaning of the statute. Mr. Montague's statement, however, read as a whole in context is not contradictory because in the first part of the statement quoted above he refers to sojourners *staying* or residing in enemy territory and later speaks of such special classes as prisoners of war, expeditionary forces and sojourners of the kind who are not to be considered as staying or residing in enemy territory.

24, cert. den. 348 U. S. 875? Equally it should be decided that having come to the United States in 1940 and having remained here during the war appellant was not resident outside the United States within the meaning of the Act.[3] The appellant's construction of the statute is not a perversion of *Guessefeldt I,* as appellee asserts (Br. 41), but is in accord with its moderate construction of the statute which requires presence plus something more to constitute residence under the Act. Appellant was never present, and therefore never resident, outside the Unitd States during the war.

2. Appellee several times asserts that appellant was resident in Switzerland while he was in the United States from 1940 to 1950. But the trial court did not find in Finding 6 (R. 68a), as appellee incorrectly asserts (Br. 42), that appellant was a resident of Switzerland after 1940 but rather that between 1929 and 1940, the period involved in the finding, he "never resided in Germany, but lived successively in the United States, Belgium and Switzerland, where in 1934 he became a Swiss domiciliary." Nor do the additional findings (Fdgs. 57-63, R. 72a-73a) state that he resided in Switzerland. Appellant when asked about his residence testified that he left Switzerland in 1940 and returned in 1950 (R. 451a). Nor did the District Court "find," as appellee again asserts incorrectly (Br. 38), that appellant was resident outside the United States although the Court did so state in its opinion (R. 44a) and in its conclusions of law (Conc. 10, R. 86a). The District Court did not state where outside the United States appellant was believed to have resided during the ten years he was in the United States. It was not denied that from 1940 to

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[3] Appellee recognizes that appellant's "situation thus exactly parallels that of Guessefeldt" (Br. 42) but he fails to draw the correct conclusion from the parallel that appellant under the Act was resident in and not outside the United States.

1950 appellant actually lived in the United States. His wife immigrated to the United States in 1941 and after 1945 they lived in an apartment in New York City (Fdg. 59, R. 72a). As a matter of law these facts cannot support a finding of residence outside the United States within the meaning and purposes of the Act.[4]

3. Appellee refers to appellant's Liechtenstein citizenship and continued interest in Germany and then makes several statements about appellant's political sympathies which are so inaccurate, misleading and prejudicial that even though irrelevant to residence they should be answered. For example, appellee asserts (Br. 39) that appellant "supported the Nazi regime in Germany except when it conflicted with his investments and personal safety (Fdg. 64, App. 73a, 133 F. Supp. 619, App. 40a, 41a)." But both the finding and the statement in the District Court's opinion cited by appellee is that appellant "was not a vigorous supporter of the National Socialist regime in Germany insofar as it conflicted with his concern to protect his financial investments and his personal safety."[5] There is ample evidence that appellant did not support but hated and opposed the Nazi regime (R. 163a, 187a, 484a, 509a, 709a).

Appellee also "quotes" (Br. 39) four alleged oral statements of appellant that Germany would win the war quickly and that Hitler was the world's greatest strategist, without revealing the three of these alleged 1939-1940 statements were attributed to appellant in the testimony of the two first trial Government's witnesses, admittedly biased, John Mason Houghland and his son Calvin Houghland.[6] The fourth "quote" that "Hitler was the world's greatest strategist" was not even attributed to appellant by an interested and biased witness but was in the form of a question on appellant's cross-examination and appellant denied it! (R. 478a).

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[4] Appellee's attempt (Br. 42) to brush aside the *Patino* and *Nubar* tax decisions cited by appellant (Br. 54) fails because under the rule of those cases alien visitors who obtained extensions of visitors' visas and remained in the United States during World War II were taxed as resident aliens.

[5] It is a serious perversion of this finding to assert that appellant supported the Nazi regime particularly when it is considered that appellee was not able to prove such a serious charge even after a most intensive investigation of appellant in Germany during the immediate postwar period when the United States, as an occupying power, had all facilities for investigation in Germany.

4. Appellee relies on the trial court's consideration of appellant's political sympathies on the issue of residence (Br. 40). Apart from their lack of relevance on this issue the reliance of the trial court and of appellee on this point emphasizes appellant's argument (Br. 72-73, *infra* 23) that appellant was seriously prejudiced by the trial court's use on the second trial on the issue of residence of all these findings about sympathies made upon the first trial in relation to numerous different issues which concededly did not include the issue of appellant's residence. Appellant has not received a trial on this issue of residence and should not be adjudged resident outside the United States on numerous facts found in the former trial of Uebersee's claim on wholly different issues.

B. *Doing business in Hungary.*—Appellee has not met appellant's argument that since the trial court refused to find that Uebersee was doing business in Hungary it was logically and legally impossible, and therefore erroneous, to find that appellant personally was doing such business after December 13, 1941 because in 1939 on behalf of Uebersee he empowered a Budapest lawyer to represent Transdanubia "on behalf of Uebersee Finanz-Korporation" (Fdg. 69, R. 74a-75a). Appellee's first argument (Br. 45) that a corporation's agent who performs the corporation's business in enemy territory is himself engaged in such business begs the question because it was not found that Uebersee Finanz-Korporation was engaged in such business.[7]

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[6] The elder Houghland, a minority stockholder of Spur Distributing Corporation, was and is President of Spur with the support of appellee who vested the majority of the Spur stock involved in this action and continued this management. This witness admitted his desire to get control of Spur away from appellant and even admitted he "would have been glad to make active efforts" to effect appellant's deportation (former Record 1209-1210). This witness was prevented from unlawfully diluting Uebersee's equity in Spur by issuance of additional unauthorized stock only upon threat of criminal proceedings by appellee (former Record 945-946, 1183-1184).

Appellee then argues (Br. 48), despite the court's refusal to so find, that the designation of an agent in 1939 to represent the subsidiary corporation, Transdanubia, constituted doing business by the parent corporation, Uebersee, after December 13, 1941. The absence of such a finding cannot be explained away by appellee's suggestion (Br. 48) that no finding was called for because Uebersee was not a party to the second trial. If appellant is to be charged with doing Uebersee's business in Hungary, surely a finding that Uebersee was doing such business is required as a basis for finding that appellant was doing its business in Hungary. The court's refusal to find that Uebersee was doing business in Hungary was not inadvertent but was its deliberate and studied judgment as shown not only by the court's failure to make such a finding but also by the court's curious finding that appellant's interest in Transdanubia's welfare made his relationship "more direct" than that of Uebersee, the parent corporation, or of Wilhelm von Opel, allegedly in control of Uebersee (Fdg. 74, R. 76a). Thus there is assigned to the alleged "agent" in the

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[7] The *Stokes* case cited by appellee (Br. 45) is not in point because the Tax Court found the taxpayer "engaged individually in the business of exploiting patents" and the court held this distinguished the case from the general rule that activities of a stockholder, director or officer in conducting corporate business "did not amount to a carrying on of a personal trade or business" which is applicable here because of the finding required by the evidence that the only Hungarian business involved was Transdanubia's business "to be performed on behalf of Uebersee Finanz-Korporation" (Fdg. 69, R. 74a-75a) and not appellant's individual business.

United States since May 1940 and who refused additional funds and suggested that the mines be sold or leased (Fdg. 31, R. 65a), a role of "doing business" greater than the parent corporation's role or Wilhelm von Opel's role simply because in 1939 on behalf of Uebersee he sent Transdanubia's lawyer undefined powers of attorney to act for Transdanubia on behalf of Uebersee. Appellant earnestly submits that this result cannot be maintained in the face of the court's deliberate refusal to find that Uebersee was doing business in Hungary after December 13, 1941.

Most significantly appellee has not answered appellant's argument that there are neither findings nor evidence that Dr. Timar, Transdanubia's attorney, did any business whatever in Hungary for Transdanubia pursuant to the 1939 powers of attorney (Br. 63). It is true that the court "infers" that Transdanubia continued in business and made ore shipments after December 1941 (Fdg. 73, R. 75a) and states that there was no evidence that the 1939 powers of attorney were revoked (Fdg. 71, R. 75a). But on the foundation of this inference and absence of evidence either as to the contents of the powers of attorney or their termination it cannot be assumed, in the absence of any evidence or finding by inference or otherwise, that Dr. Timar acted and did business after December 13, 1941 pursuant to these undefined powers of attorney so that appellant, in the United States, may be charged with doing business in Hungary with the result that all of his property in the United States may be confiscated on the basis of inference, lack of evidence and assumption. On this record how can it be said that Dr. Timar, who for all that appears may have been away in the Hungarian army before December 13, 1941, acted pursuant to these undefined powers of attorney after December 13, 1941 and that consequently appellant was doing business in Hungary because in 1939 he sent the powers of attorney to Dr. Timar on behalf of

Uebersee which corporation the court refused to find was doing business in Hungary?

Appellee suggests (Br. 49) that the Supreme Court's statement that Frankenburg "exercised control over petitioner's investments" until the vesting (343 U. S. at 209) requires rejection of appellant's argument that any agency to Dr. Timar to act for Transdanubia on behalf of Uebersee terminated upon the entry of the United States into the war at least insofar as appellant, present in the United States, was concerned. This suggestion fails to distinguish, as the judicial authorities distinguish, between an agency by an enemy to a non-enemy to hold and manage property for the enemy in the United States and an alleged prewar power of attorney by a person in the United States to an attorney in an enemy country purportedly to carry on business. In the first case "the existence of that power" (343 U. S. 212) to use property for the enemy controls but in the second case that is no basis for holding that an alleged prewar agency to an attorney abroad to carry on a course of business during the war continues. The present case is more like the *Sovfracht* decision and the other cases cited by appellant (Br. 61-62) in no one of which was an agency held to continue in order to penalize the principal as is done here. Moreover, the enemy power or potentiality to control property in the United States satisfies the statutory requirement for vesting but to make a person an enemy by doing business an actual, not a potential, carrying on of business during wartime is required.

C. *Erroneous trial of this issue.*—Appellee's argument (Br. 50-54) that appellant should have known that the issue of doing business within Hungary was involved because of the general reference to "enemy status" in appellee's pretrial memorandum (R. 19a) and in the trial court's pretrial opinion and order (R. 31a-32a) does not meet appellant's contention that appellant and his counsel, not inexperienced in cases of this character, were genuinely surprised by the first reference to appellant's alleged doing business in Hungary in appellee's memorandum of law submitted at the opening of the trial. Appellant was unfortunately but in good faith misled by the absence of any reference whatever to appellant's doing business in enemy territory as a basis for denial of his claim either in the appellee's pretrial memorandum (R. 18a-20a) or in the court's pretrial opinion and order (R. 21a-33a) which are devoted entirely to the question of appellant's status as a stockholder of a tainted corporation and the procedural question of *res judicata.* The statement in appellant's rather extensive pretrial memorandum, not challenged by appellee, that appellant "is *admittedly,* since prior to December 6, 1941 a citizen of Liechtenstein who was not at any time relevant to this action either a resident of, or present in, enemy territory or enemy-occupied territory, or *doing business within such territory*" (emphasis supplied), and the appellant's failure to discuss this question in his long trial brief submitted to the court at the opening of the trial, make it clear that in fact appellant did not know that this issue was to be tried. In view of the specific questions discussed in the pretrial memoranda and the pretrial opinion, the general reference to "enemy status" in fact gave appellant no notice that doing business in Hungary was an issue. In addition, the refusal of the trial court at the first trial to find that Uebersee was doing business in Hungary gave appellant reasonable ground to believe, in the absence of contrary pretrial notice, that it would not be contended that Uebersee's stockholder, in the United States from 1940, was to be charged with doing business in Hungary after December 13, 1941 on behalf of Uebersee through an alleged agency.

Appellee's contention (Br. 52) that appellant's pretrial production of Dr. Timar's 1939 letters requesting powers of attorney placed appellant on notice that the issue of his doing business in Hungary was involved is not well taken because in fact it did not place appellant on any such notice and at all times it was believed that this evidence was sought on the issue of enemy taint as appellant's counsel stated upon the trial when no objection was made to the admission of the evidence on the question of enemy taint (R. 308a-312a). It is not correct, as appellee further suggests (Br. 53), that appellant was under the same burden to produce evidence, including evidence of Swiss or Hungarian law, to meet the issue of the Timar letters and the powers of attorney, whether the evidence was offered on enemy taint or doing business in Hungary. In appellant's view the question of enemy taint involved merely the weight to be given to his conduct in 1939 in participating in Uebersee's and Transdanubia's business before he came to the United States in May 1940, but the issue of doing business in Hungary after December 13, 1941 through an alleged agency granted to a Hungarian attorney in 1939 involves the wholly different question of what in fact was done by the Hungarian attorney under that agency after December 13, 1941 and what was the contents and status of the powers of attorney under Hungarian and Swiss law after Hungary and the United States were at war. Appellant had no opportunity whatever after the trial started to obtain either the facts or the law bearing on these questions and, indeed, the trial court did not even rule on the appellant's objection to the introduction of this issue until after the trial was over (R. 312a, 54a).

It is submitted that appellant was in fact prejudiced by the injection of this issue into the trial and this court should not base any decision upon this issue without giving the appellant an opportunity to try the issue which affects not only his interest in the corporate property involved in this suit but also his individual property vested by appellee.

III.

Appellant is not a statutory enemy under §2 for all purposes.

Appellee contends not merely that appellant's corporate "interests are enemy tainted and may not be recovered by him" because held primarily for the benefit of his parents (R. 47a-48a) but also that appellant's prewar activities and expressions of sympathy for Germany make him a statutory enemy under §2 ineligible to recover any individually owned vested property (Br. 54-69). Appellant submits that this wholly unwarranted extension of the doctrine of *Uebersee I* beyond enemy controlled neutral corporations to include as statutory enemies for all purposes individuals not defined as such in §2(a), (b) and (c) imputes an intention to Congress which cannot be found any place in the text or legislative history of the statute. The appellee's extreme contention, however, is the logical extension of the ruling of the court below that enemy taint may be extended to neutral citizens not resident in enemy territory or otherwise expressly classified as enemies under §2(a), (b) and (c) of the Act and involves all the difficulties already pointed out by appellant (Br. 29-34). Moreover this alleged ground of enemy status, as agent of "the enemy" first appears in the trial court's opinion and not within the pretrial and should not be the basis for decision.

Appellee suggests (Br. 58) that the Supreme Court in *Uebersee II* by quoting the District Court's first opinion to the effect that the "neutral aspect of ownership in the property is insignificant" (82 F. Supp. at 606, 343 U. S. at 212) in some way implied approval of the use of appellant's alleged "enemy tendencies" in determining his neutral or enemy status. The appellant submits that a reading of the two opinions makes it clear that both courts are discussing the limited quantum of property rights of the neutral stockholder and not his enemy sympathies or tendencies.

The appellee's contention that appellant's actions in changing his citizenship from German to Liechtenstein in 1939 were an attempt to cloak the vested property on behalf of his parents (Br. 61) wholly misses the point that no effort at all was made to change or conceal the usufructuary property interest of the appellant's parents and this case is wholly unlike any of the decided cases in which concealment was attempted (Br. 38). The appellant was entitled to change his citizenship if he chose and this did not in any way constitute a "masquerade" of enemy status which is determined by residence and not by citizenship. The validity of appellant's Liechtenstein citizenship was established at the first trial (R. 61a) and not challenged by appellee under the second trial.[8]

Appellee states that appellant's prewar activities in relation to his father's property interests in Germany are not urged as establishing enemy taint "in and of themselves" but to demonstrate a course of conduct "as agent and representative of his father, an enemy" (Br. 63-64). But appellant's father was not an enemy until December 8, 1941, long after appellant had come to the United States and ceased all of these activities.

Appellee's argument (Br. 64-65) that appellant's response to the communication from the German Consulate in New York in February 1941 indicates his willingness to represent the German government is not supported by the record. The Nazi government had criticized Wilhelm von Opel for having sold control of Adam Opel, A.G. to

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[8] The *Nottebohm* decision cited by appellee (Br. 60-61) is limited to the preliminary question whether it was appropriate under applicable rules of international law for the International Court of Justice to take jurisdiction and grant relief to one sovereign against another in respect of property of an individual seized by the defendant state where the individual, although a citizen of the plaintiff state, resided permanently in the defendant state.

American interests and obviously transmission of a message through the Consulate at a time when Germany was at war in Europe indicated to appellant that his father was acting under pressure from the German government and that his personal safety might be involved. Appellant's conversation with an official of General Motors, which came to nothing, was the least he could do in response to his father's message and did not indicate any willingness to act for the German government.

Appellee's comments about the testimony of Colonel Mettler and Irwin Schattman (Br. 66-67) fail wholly to answer the objective facts that prior to the entry of the United States into the war appellant actually engaged in United States defense work and even after his internment he was "an excellent source of information on Germany" (R. 184a).

Appellee's contention that the Supreme Court's ruling that the existence of enemy power to use property in the United States is sufficient basis for its seizure (343 U. S. at 212) also justifies reliance upon prewar conduct to determine enemy taint ignores the obvious distinction between enemy control of property in the United States and prewar activity of neutral citizens unrelated to property in the United States.

Finally, appellee argues on this point (Br. 68) that enemy taint established merely by prewar activities or sympathies makes an individual an enemy for all purposes on the ground that the Act seeks to deny recovery to persons who have "associated themselves with the enemy." For this startling and broad contention appellee relies upon a decision that an agent of an enemy government during wartime is an enemy for all purposes (Br. 68). But §2(c) of the Act expressly makes an agent of an enemy government an enemy and the whole burden of appellant's argument is that in the absence of such an express definition

Congress has not made prewar conduct or expression of sympathies a basis for classifying an individual as an enemy.

IV.

Res judicata was erroneously applied.

Appellee has the burden of proof of his defense of *res judicata* and if any one of appellant's several independent grounds for barring *res judicata* is valid appellant is entitled to a new trial of his eligibility to recover part of the vested assets unhampered by the trial court's erroneous reliance on the voluminous facts and findings in the first trial.

1. *Non-finality of former judgment.*—The Supreme Court's last decision, although affirming the judgment as to Uebersee, vacated the judgment as to appellant to permit assertion of his claim and had the legal result of preventing application of the former judgment against appellant as *res judicata*. The effect was not "merely to permit the consideration of a new claim of a separate interest in appellant" as appellee contends (Br. 75) but also, and more importantly, to permit judicial consideration of appellant's eligibility as a non-enemy stockholder to recover that separate interest not prejudiced by former judicial consideration of appellant's alleged political sympathies. It is not and could not be denied that the trial court in determining that appellant is an ineligible enemy and enemy tainted relied very heavily on the evidence and the court's own findings in the prior trial. In fact appellant did not get a separate trial of his eligibility to recover in this suit and since the former judgment was vacated and therefore not final on *res judicata* against appellant it was clearly an error and in conflict with the Supreme Court's decision to hold that appellant was bound by the former findings.

2. *Stockholder not in privity with corporation.*—Appellee argues (Br. 70, 76-77) for application of a general rule of privity based on control of and a financial interest in prior litigation, relying on cases not involving stockholders and corporations (Br. 70), rather than for application of the specific rule that a stockholder with a separate cause of action is not in privity with his corporation for purposes of *res judicata* as appellant urges (Br. 67-68). The legally recognized separate interests of a stockholder and of his corporation in litigation provide a sound basis for application of this separate specific rule rather than the general rule of privity between such parties as principal and agent or insurer and insured or the like where this separate interest does not exist. The present case illustrates the soundness of the specific rule because upon the first trial of the corporation's claim appellant and the corporation were interested in establishing the corporation's eligibility and not the appellant stockholder's eligibility. The specific rule should be applied here and consequently *res judicata* was erroneously applied.

3. *Different issues in the two trials.*—Appellee argues (Br. 74, 77) that appellant's "personal status" (Br. 74) and "personal enemy taint" (Br. 77) were determined and involved in the first trial apparently because appellee contended that appellant was enemy tainted. But the crucial question is not the appellee's contention but the judicial determinations actually made. Appellant has pointed out (Br. 68-74) that even the trial court recognized that appellant's enemy taint or eligibility to recover was not an issue in the first trial but his alleged political interests "were considered only as they related to plaintiff corporation's enemy taint" (R. 25a). Thus it is plain that evidence concerning appellant's alleged political sympathies considered on the issue of plaintiff corporation's enemy taint on the first trial was erroneously held upon the second trial

to be binding upon appellant on the wholly different issue of his eligibility. This use of evidence of a former trial, introduced on the issue of one party's enemy taint, to determine an intervening party's enemy taint violated the rule that only ultimate issues are *res judicata* and requires a new trial of appellant's eligibility under the statute. Similarly appellant's interest in the vested property (Br. 73-74) and appellant's right to have that interest determined according to Swiss law (Br. 75-87) were new issues upon which appellant was entitled to but did not receive a trial but was held bound by the prior determination of different, even if related, issues on the first trial.

4. *Final appellate judgment.*—Wholly apart from and independent of the other grounds barring application of *res judicata* mentioned above, appellant argues that his personal taint or ineligibility to recover as enemy tainted was not *res judicata* because the trial court's former judgment was not affirmed by this Court or the Supreme Court on any such ground (Br. 74). Appellee attempts to answer this contention, which is based on the indisputable rule of law that only the ground of decision below determined on appeal is *res judicata,* by arguing that the Supreme Court approved "the findings relating to appellant's personal status" (Br. 74, 77).[9] Appellee's contention is based solely upon the circumstance that the Supreme Court in its opinion (343 U. S. 212) quotes a statement from the District Court's opinion that the "neutral aspect of ownership in the property is insignificant * * * " (82 F. Supp. 606) and the further circumstance that in a prior part of its opinion the District Court discusses appellant's Liechtenstein citizenship and activities in respect of Transdanubia. But a

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[9] Appellee concedes that this Court carefully restricted its decision to the principal issue of taint of the corporation by enemy ownership and control and did not pass on the issue of appellant's enemy taint (Br. 77).

reading of the District Court's opinion makes it clear that the quoted reference to the neutral aspect of ownership refers not to appellant's activities but to the asserted limited quantum of his property rights in the trial court's view, and to the substantial ownership by the usufructuaries little "short of full ownership by an enemy" (82 F. Supp. at 606). Similarly this Court in its opinion stated that this case "involves the ownership by enemy nationals of the economic benefits of American business" (196 F. 2d at 559) and not merely enemy taint. The Supreme Court in its opinion, like this Court, makes no reference to Fritz von Opel's alleged enemy sympathies and it is impossible to say that the judgment was affirmed on any ground other than the ground that the ownership and control of the corporation by the German usufructuaries, wholly apart from appellant's interests or activities, were sufficient to taint the corporation. It necessarily follows that the District Court's ruling that appellant was bound by the evidence and findings made with respect to his political sympathies, a ground not affirmed on appeal, was prejudicial error entitling appellant to a new trial.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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United States Court of Appeals

For the District of Columbia Circuit

United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 14 1957

Joseph W. Stewart
CLERK

No. 13265

Fritz von Opel, appellant,

v.

Herbert Brownell, Jr., Attorney General,
as Successor to the Alien Property Custodian,
appellee.

ANSWER TO PETITION FOR REHEARING

1. Appellant's petition misconstrues the decision of this Court and his own position in this litigation. Appellant was permitted to intervene herein to assert his rights as an innocent stockholder within the meaning of *Kaufman* v. *Societe Internationale,* 343 U.S. 156, not to assert any direct claim of ownership to the vested property.

The Court having correctly determined upon abundant evidence that appellant was not an innocent stockholder within the meaning of *Kaufman,* it became unnecessary to consider any claim of a severable interest of appellant. If he is not an innocent stockholder, he may not recover any portion of the vested property. Appellant, therefore, may not recover 20% of the income as asserted, even if it be assumed that he previously had a right thereto.

2. The Court, in its opinion herein, also determined that the principles of *res adjudicata* or estoppel by

judgment were applicable to appellant since he controlled the prior aspects of this litigation in which he had a financial interest. Upon the prior appeal, at the request of the then appellant, Uebersee, for clarification or modification of the opinion of this Court, a supplemental opinion was filed determining, among other things, that the present intervener, Fritz von Opel, under the gift agreement, had a mere contract right against his parents for 20% of the income received by them and that this was not a right *in rem*. The Supreme Court, in unanimously affirming the judgment of this Court as to Uebersee, also referred to this "right to 20% of the income" and adopted the District Court's statement that "the neutral aspect of ownership in the property is insignificant" (343 U.S. 210, 212), a statement hardly consistent with an *in rem* right to 20% of the income or of the property itself, as appellant now asserts.[1] The Supreme Court is not required to enumerate each finding or statement which it approves in affirming the judgments of the courts below. The prior determination of this Court, as affirmed by the Supreme Court, was a final determination upon an issue tendered by Uebersee in litigation controlled by the present appellant.

Nor is it correct to assert that this determination "was not based upon any evidence" (Pet. pp. 2-3). This issue was fully litigated upon the first trial of the action and expert testimony on German law as to the effect of the

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[1] The petition for rehearing refers to a claim for 20% of the vested property, as well as 20% of the income (Pet. pp. 2-3). There is no provision in the agreement granting appellant a 20% interest in the property itself. The gift agreement providing for the usufruct clearly limits appellant's rights to income. The only provision of that agreement relating to any right to 20% states explicitly "20% of all dividends and interest received will accrue to Fritz von Opel" and in no way refers to any interest in the corpus or principal.

20% provision was adduced (Former App. 308-311, 315-316, 1328, 1388-1389). Included in the evidence on that trial was the record of the "Gold" case, instituted by appellant in the name of Uebersee, in which appellant referred to this interest not as an *in rem* right, but as "mere legal title plus 20% of the dividends and interest" and in which it was stated that this right was a mere personal right against his parents, not an *in rem* or beneficial interest in the property. (Def. Ex. 8, Former App. 2001, 2084).

The issue as to the effect of the provision for 20% of the income having been litigated and determined in prior litigation controlled by appellant, he is bound by such determination and may not relitigate such issue anew.

Respectfully submitted,

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